Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit held that petitioner, the Michigan High School Athletic Association, Inc., violated the Equal Protection Clause because it did not establish an "exceedingly persuasive justification" for differences in the seasons selected for boys' and girls' high school athletic competitions. The Court held that a violation was established even if the differences were the result of good faith decisions made without discriminatory animus. The case presents two important questions which merit review by this Court:

(1) Whether the Sixth Circuit erred by holding, in conflict with decisions of this Court and the Third, Fourth, Eighth and D.C. Circuits, that differences in the implementation of constitutionally authorized single-sex programs must be characterized as presumptively unconstitutional gender classifications subject to intermediate scrutiny.

(2) Whether plaintiffs' Equal Protection claim under 42 U.S.C. § 1983 should be dismissed in accordance with the rule followed in the Second, Third, and Seventh Circuits, because the comprehensive remedies of Title IX of the Education Amendments of 1972 are exclusive.

LIST OF PARTIES

The petitioner is the Michigan High School Athletic Association, Inc., on behalf of itself and its members.

The respondents are Communities for Equity, on behalf of itself, its members, and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated.

RULE 29.6 STATEMENT

Petitioner Michigan High School Athletic Association, Inc., does not have a parent corporation and no publicly held company owns 10% or more of Michigan High School Athletic Association, Inc.'s stock.

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Fredrick Kunkle, *Maryland School Segregates to Boost Achievement*, Wash. Post, Jan. 8, 2005, at B01 30

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The District Court's opinion is reported at 178 F. Supp. 2d 805 (Pet. App. 20a-118a). The Sixth Circuit's opinion is reported at 377 F.3d 504 (Pet. App. 1a-19a).

JURISDICTION

The Sixth Circuit denied the Michigan High School Athletic Association, Inc.'s petition for rehearing and rehearing *en banc* on November 9, 2004 (Pet. App. 119a-20a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Section 901(a) of Title IX of the Education Amendments of 1972 provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

20 U.S.C. § 1681(a).

STATEMENT OF THE CASE

This case concerns a constitutional challenge to the scheduling of athletic seasons in high school girls' sports. The Sixth Circuit's holding that petitioner violated the Constitution because it failed to establish an "exceedingly persuasive justification" for its girls' athletic schedules presents two questions of national importance that merit review.

First, this case presents an opportunity to clarify a fundamental point about the application of intermediate scrutiny that has divided the lower courts. Separate facilities or programs for men and women may be constitutional if the separation is substantially related to an important government purpose, and the separate programs or facilities are substantially equal in offerings and resources. Plaintiffs do not challenge the legality of single-sex high school sports teams. But whenever separate programs exist, good faith decisions implementing those programs will inevitably create some differences. Under a proper reading of this Court's equal protection jurisprudence, those differences should not themselves be treated as facial gender classifications, and any disparate impact they create is constitutional unless the plaintiff proves either (a) that those differences were motivated by discriminatory animus, or (b) that the overall programs are so unequal that the separation itself becomes unconstitutional.

The Sixth Circuit in this case instead treated *any difference* between the male and female programs as a presumptively unconstitutional facial gender classification, and shifted the burden to defendants to justify the difference under intermediate scrutiny. That is a profound misunderstanding that potentially subjects every detail of running a single-gender athletic team, school, or prison to a constitutional challenge. It conflicts with decisions of this Court, and of the Third, Fourth, Eighth, and D.C. Circuits.

Second, there is an acknowledged circuit split over whether Title IX is the exclusive remedy for alleged gender discrimination in athletic programs, or whether plaintiffs may also rely on the Equal Protection Clause enforced through § 1983. Six federal courts of appeals have addressed this issue and divided evenly. The Sixth Circuit has ruled that § 1983 claims are not precluded, allowing the court to affirm the injunction in this case solely on the basis of the § 1983 claim without resolving the Title IX issues.

Factual Background

Petitioner Michigan High School Athletic Association, Inc. ("MHSAA") is a private, non-profit organization made up of public and private secondary schools in Michigan, which serves and supports interscholastic athletic competition.[1] Membership in MHSAA is voluntary. MHSAA schedules post-season interscholastic tournaments in some sports and, to establish a level playing field for those tournaments, also publishes eligibility rules that specify when practice and competition seasons start and end, the maximum number of games that may be played, and the rules of competition. Apx.[2] 2208. Member schools set their own schedules, but must abide by the MHSAA guidelines if they wish to participate in the post-season tournament. As a result, the district court concluded that MHSAA effectively controls the scheduling of sports seasons for its member schools. MHSAA conducts twelve tournaments for girls only and twelve tournaments for boys in which girls may also compete. Apx. 2051.

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[1] The courts below held that MHSAA is a state actor under the standards established by this Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), even though the Michigan Supreme Court has held that MHSAA is a creature of its member schools and has no legal authority over them. *See Kirby v. Mich. High Sch. Athletic Ass'n*, 585 N.W.2d 290, 297 n.17 (Mich. 1998). Although MHSAA believes that holding is error, it does not seek further review of that issue here.

[2] "Apx." refers to the Appendix previously submitted to the United States Court of Appeals for the Sixth Circuit in this case.

As girls' athletics gained in popularity in the early 1970s, MHSAA's member schools faced significantly rising numbers of athletes and teams without a comparable increase in the availability of facilities, coaches, officials, etc. Schools—both MHSAA members and non-members—therefore decided early on that, in certain sports, different seasons for the boys' and girls' teams would allow them to offer more athletic opportunities for all students. For example, a 1985 survey of member schools revealed that 88.5% preferred separate seasons for boys and girls in basketball, 68.3% favored separate seasons in golf, 88.8% for soccer, 83.4% for swimming and diving, and 88.4% for tennis. Apx. 3289. The conclusions reached by Michigan schools are not unusual. Schools in 31 of the 50 states have separate seasons for girls and boys in some high school sports. Apx. 3394. At the professional level, the WNBA has elected to play during the summer rather than simultaneous with the fall-to-spring NBA season. The NCAA similarly uses different seasons for men's and women's volleyball and water polo.

Specific scheduling decisions were made only after extensive discussions among MHSAA's member schools. For example, until the early 1970s there was no MHSAA tournament in girls' basketball, and there was no consensus among member schools when to schedule girls' basketball. In the early 1970s many member schools began moving girls' basketball to the fall to make better use of scarce facilities and increase participation in the emerging girls' programs. Pet. App. 34a-35a. When surveyed by the MHSAA in 1973 about the best time to schedule a girls' basketball tournament, 72% of member schools voted for the fall. Apx. 3281. MHSAA has periodically surveyed its membership to ensure that the existing seasons are optimal. In May 1979, 90.2% of responding schools voted to keep girls' basketball in the fall. In 1981, 88% reaffirmed those preferences. Apx. 3289. And coaches surveyed in 2001 voted overwhelmingly to retain the fall season for girls' basketball. Apx. 3724-25, 4240.

Although the particular seasons chosen in Michigan, for both girls and boys, do not uniformly conform to the season in which that sport is traditionally played at the college level, Michigan is hardly alone. Each state throughout the country struggles with comparable decisions each year, and many share Michigan's approach to scheduling. For example, like Michigan, 18 other states schedule girls' golf in spring, 16 schedule girls' swimming and diving in fall, 16 schedule girls' tennis in fall, and 21 schedule girls' soccer in spring. And the seasons chosen by MHSAA and its member schools have been very successful at promoting participation in girls' athletics. Although Michigan ranks eighth nationwide in overall population as well as population of 14- to 17-year-old girls, it ranks third in number of girls participating in basketball and volleyball, fourth in number of girls participating in tennis, swimming and diving, and golf, and seventh in number of girls participating in soccer. National participation rankings for Michigan's girls equals or exceeds Michigan's boys in many sports, including basketball, golf, tennis, swimming and diving, and soccer.

Proceedings In The Trial Court

1. Plaintiffs-Respondents Communities for Equity, et al. represent a class of female high school athletes in Michigan. They alleged that MHSAA's scheduling of certain seasons and tournaments discriminates against female athletes on the basis of their gender. They focused on six girls' sports: basketball, volleyball, soccer, Lower Peninsula golf, Lower Peninsula swimming and diving, and tennis. The gravamen of plaintiffs' complaint is that MHSAA schedules these six girls' sports in "disadvantageous" seasons—either a "nontraditional" season (as measured by collegiate seasons), or a "traditional" season which is nonetheless less favorable, in plaintiffs' opinion, than the season used by either Michigan's boys or by girls in certain other states. Plaintiffs alleged that these "disadvantages" violated Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 *et seq.* ("Title IX"), the Equal Protection Clause as enforced through 42 U.S.C. § 1983, and Michigan's Elliott-Larsen

Civil Rights Act, Mich. Comp. Laws § 37.2101. Plaintiffs did not challenge the decision to have separate sports teams for boys and girls.

MHSAA responded that the seasons were selected by the schools themselves out of legitimate logistical concerns relating to the availability of facilities, coaches, and officials, and that MHSAA tournaments were planned to conclude the chosen seasons. MHSAA also argued that its current scheduling was the product of good faith decisions intended to maximize participation rates, promote the independent identity and significance of girls' sports, increase the attention paid to girls' teams by student bodies and the media, and respect the preferences of member schools and many of the girls themselves. It offered testimony and evidence concerning its decision-making process, survey results from many years of discussions with member schools, and testimony of prominent girls' coaches supporting its approach.

2. The district court concluded that respondents were not required to prove that the selection of these six seasons was motivated by discriminatory animus. It held instead that under this Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996) (*"VMI"*), the burden of proof was on MHSAA to show an "exceedingly persuasive" justification for the decision to choose different schedules for boys' and girls' seasons—i.e., that its "classification between the sexes in scheduling sports' seasons serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." Pet. App. 97a. The court held that "MHSAA chose to rely on anecdotal and weak circumstantial evidence," and had not carried that burden. *Id.* at 98a.[3]

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[3] The district court also ruled that MHSAA had violated Title IX because its scheduling denied girls certain benefits of school athletic programs. It further held that Michigan's civil rights statute mirrored the Equal Protection Clause, and thus found liability under that statute as well.

The district court nevertheless found that "nontraditional" scheduling sends a message to girls that they are second class or subordinate to their male counterparts. It also found that the girls' seasons chosen by MHSAA for these six sports were "disadvantageous" compared to the boys' seasons or to the seasons used for girls in other states. The court mandated injunctive relief consistent with its opinion.[4]

As the overview of its analysis for each sport reveals, the "disadvantages" described by the district court are highly debatable, frequently of concern to very few athletes, and often the by-product of scheduling decisions made by outside actors such as Nike, professional sports' teams, or the NCAA. There was no evidence that MHSAA even took these third party scheduling decisions into account when selecting the boys' seasons, yet it was found to violate the constitution by failing to make them paramount for the girls.

Girls' Basketball in Fall

Michigan girls play basketball in the fall and Michigan boys play in the winter. The district court perceived a number of disadvantages in the fall schedule. Michigan girls playing in the fall:

- "cannot participate in special events for professional or semi-professional teams, such as playing before or at half-time of a professional game," Pet. App. 41a, or in "national shoot-outs such as the Nike and Blue Star shootouts," *id.* at 44a;
- "do not get to participate in 'March Madness' or the excitement and publicity surrounding this time period," *id.* at 41a;

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[4] Under the court-ordered rescheduling, the girls' basketball and volleyball seasons would switch, with basketball moving to winter and volleyball to fall. The golf and tennis seasons in the Lower Peninsula would switch, with boys' golf and girls' tennis moving from fall to spring; and girls' golf and boys' tennis moving from spring to fall. In the Upper Peninsula, MHSAA soccer tournaments would be offered in the fall for girls, and in the spring for boys.

- must play one game a week on Thursday (a school night) to avoid conflicting with football, although that game could be played on Fridays in the winter, *id.* at 42a;
- cannot compete against girls from neighboring states that play basketball in the winter, *id.* at 44a; and
- are less likely to make the Parade All-American lists that come out in March, because "'everybody's forgotten about you,'" *id.* at 43a (citation omitted).[5]

MHSAA disputed many of these supposed disadvantages, as well as their importance to the purposes of its athletic programs. For example, the head women's basketball coach from the University of Michigan testified that the fall season is actually a substantial recruiting *advantage* for Michigan girls because college coaches can attend as many high school games as they like before the beginning of October. After that point, such visits count against a forty "contact" limit imposed by the NCAA. It is also more convenient for college coaches to visit high schools during the fall, because their own teams have not begun practicing. *Id.* at 45a.

The district court concluded, however, that MHSAA had provided "only circumstantial evidence that Michigan girls playing in the winter would not be recruited at the same level that the MHSAA asserts that they are in the fall," and that in any event "moving girls' basketball to the traditional winter season would still give girls exactly equal opportunity to be recruited for collegiate play as boys' basketball players." *Id.* at 39a-40a.

Girls' Volleyball in Winter

Michigan boys do not play volleyball at all. MHSAA scheduled girls' volleyball in the winter instead of the fall because (as plaintiffs themselves have insisted) there is a

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[5] The district court conceded that Michigan girls were still eligible for the list, but stated that "MHSAA did not ... provide any evidence that suggested that the ability to be ranked was not influenced by the fall playing season." *Id.* at 43a-44a.

shortage of winter sports opportunities for girls in Michigan. That schedule has been highly successful. Winter volleyball attracts more participants than any other girls' sport. Pet. App. 48a. Of member schools surveyed, 90.2% in 1979 and 88% in 1981 favored retaining the winter schedule for girls' volleyball. Apx. 3289.

The district court nonetheless found that the winter season "disadvantages" Michigan girls in comparison to girls in other states who play volleyball in the fall. The court reasoned that college recruiting for girls' volleyball principally focuses on private club programs rather than interscholastic competition. There are two periods during which these private programs take place, and the interscholastic Michigan girls' season conflicts with one of them. As a result, Michigan girls are less highly seeded in private club volleyball tournaments, and are named to All-American teams and national rankings less often than girls from other states. Michigan girls also cannot compete against teams in neighboring states since those states have different seasons. Pet. App. 50a-56a.

The district court acknowledged MHSAA's evidence that girls benefit from playing both basketball and volleyball, but again concluded that MHSAA had not carried its burden of proof because it "presented no evidence to indicate why" any facilities conflicts could not be solved if the volleyball season "were to be switched with girls' basketball." *Id.* at 57a. The court similarly recognized that "MHSAA is correct that Michigan girls and their high school coaches have had success in volleyball in which the entire state can take pride," but concluded that "MHSAA failed to prove whether this indicates that the winter, non-traditional volleyball season is not a disadvantage ...." *Id.*

Girls' Soccer in Spring

Michigan girls play soccer in the spring, and the boys play in the fall. The district court acknowledged that there is not "one clear season in which high school girls play in soccer across the nation," and that 22 states schedule girls'

soccer in the spring. Pet. App. 58a & n.30. Nonetheless the court concluded that the spring schedule is disadvantageous because sometimes the fields are still frozen when the season begins, which can force more frequent make-up games later and increase the risk of injury. *Id.* at 59a-60a. The court also found that private club and amateur programs generally take place in the spring, and that Michigan girls therefore must choose between those outside leagues and interscholastic competition. *Id.* at 61a. Michigan girls also may not have been seen by college recruiters in their senior year before the first round of scholarships are awarded in November. *Id.* at 60a-61a. The court also found that MHSAA had failed to carry its burden of proving that the spring schedule did not negatively impact Michigan girls in national "All-American" rankings. *Id.* at 61a-62a.

The district court acknowledged that the spring schedule has some advantages. Girls can play soccer on Friday nights in the spring, while the boys cannot in the fall because of football. *Id.* at 62a. There are more experienced officials available in the spring, because colleges play soccer in the fall. *Id.* A combined season could be difficult because a third of high school coaches in Michigan coach both the boys' and girls' teams, and because "[t]he quality of the surfaces of soccer fields will ... decline with twice as many players on them." *Id.* at 62a-63a. But the district court again held that MHSAA had simply failed to carry its burden of proof. "Some anecdotal evidence was presented that logistical problems would occur if both sexes played soccer in the fall or in one season generally, but that evidence was insufficient for the Court to make a finding that logistical problems, if they exist, are insurmountable now or ever." *Id.* at 58a; *see also id.* at 63a ("[B]ecause of the lack of more specific evidence on these points, the Court is not convinced ....").

Lower Peninsula Girls' Golf in Spring

Some, but not all, of Michigan's girls' golf teams play in the spring—which is the traditional season for golf, the

season the NCAA uses, and the season in which all Michigan boys played until the 1970s. The district court nonetheless found that the spring is disadvantageous because the courses are in poorer condition and girls must compete for tee times with more members of the public. Pet. App. 64a-65a. It also noted that college letters of intent are traditionally signed in November, and some Michigan girls have not yet played their senior season by then. Boys, playing in the fall, also go straight from summer play into their season, while girls must rebuild their skills after the winter break. *Id.* at 65a.

The court acknowledged MHSAA's counterargument that the longer daylight hours in the spring make it "easier to play eighteen holes of golf without missing school," but found that that did not "make[] up for the other disadvantages of the spring golfing season." *Id.* at 66a. Once again, it held that MHSAA had simply failed to carry its burden of proof: "No significant evidence was introduced ... that logistics would make maintaining both the girls' team and the boys' team in the same Lower Peninsula golf season difficult or impossible." *Id.*

Lower Peninsula Girls' Swimming and Diving in Fall

The Michigan girls' Lower Peninsula swimming and diving season is in the fall, and the boys swim in the winter. The district court found that the winter season was more advantageous because private club tournaments take place in winter so boys can go directly from their season to club tournaments while girls have a gap. National and amateur swim meets also take place in the spring, so girls face a larger gap between their season and the tournaments. Pet. App. 68a-69a. The winter season is also two weeks longer. *Id.* at 69a.

On the other hand, the district court recognized that the fall season allows girls to transition smoothly from *summer* swimming programs and the fall has fewer interruptions like exams, the winter holidays, and spring break. *Id.* at 70a. The court also acknowledged MHSAA's proof that "high

school swimming programs in Michigan are flourishing for girls, but declining for boys." *Id.*

The district court held that MHSAA had not carried its burden of proving a need for separate seasons. Although it acknowledged that one third of Michigan swimming coaches coach both girls and boys, *id.* at 70a, the court held that "the anecdotal evidence presented of logistical problems was insufficient to prove logistical problems would occur if both sexes swam in the same season." *Id.* at 66a. And "[i]f logistical problems would exist, there was also insufficient evidence that those problems would not have solutions." *Id.*

Girls' Tennis in Fall

The court concluded that the boys' spring season for tennis is more advantageous than the girls' fall season. The fall season is approximately 20 days shorter than the spring. Pet. App. 72a. The spring season also immediately precedes the U.S. Tennis Association's tournament circuit, so boys have played more immediately before the circuit than girls, who face a gap between their season and the tournament. *Id.* (Of course, the district court thought that *following* summer play was an unfair advantage for boys in golf.)

Proceedings On Appeal

The Sixth Circuit adopted the district court's findings, and affirmed. The Sixth Circuit agreed with the district court that "scheduling team sports in different seasons based on gender" was a facial gender classification, and that the burden was therefore on MHSAA to show an "exceedingly persuasive" justification—i.e., that its scheduling decisions were substantially related to achieving an important government objective. Pet. App. 14a. It held that MHSAA had not provided an "exceedingly persuasive" justification. *Id.* at 15a. The Sixth Circuit also squarely rejected MHSAA's argument that plaintiffs were required to prove discriminatory animus. "Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *VMI* imposes no requirement upon [plaintiffs] to show that an evil,

discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls." *Id.* at 16a.

The Sixth Circuit declined to consider the claims under Title IX or the Michigan civil rights statute because the Equal Protection ruling sufficed to affirm the injunctive relief.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve a profoundly important conflict concerning the nature of intermediate scrutiny. Certainly Michigan's decision to have separate high school sports teams for boys and girls is a facial gender classification, subject to intermediate scrutiny. But plaintiffs have never challenged that classification. Instead they challenge good faith scheduling decisions about when particular teams will play. The decision when to schedule Team A and Team B is unrelated to the gender composition of the teams and does not "classify" anyone. Under this Court's precedents, any disparate impact on women resulting from such decisions is unconstitutional only if the plaintiffs prove that they were motivated by discriminatory animus, or that the boys' and girls' athletic programs are not substantially equal overall. Yet the district court and Sixth Circuit in this case placed the burden on the *defendant* to prove, somehow, that its selection of a season for girls was supported by an exceedingly persuasive justification unless it mirrors the boys' season.

That holding turns every detail in the administration of separate programs for men and women into a constitutional case. As this Court recognized in *VMI*, separate programs or facilities will never be precisely identical. Even if the women's leadership program at Mary Baldwin College that Virginia proffered as an alternative to Virginia Military Institute ("VMI") had been substantially equal in resources, facilities, and programs, it would still have been located in Staunton, not Lexington. The layout of the campus would have been different. Its faculty would inevitably have been

weaker in some subjects, and stronger in others. And the menu served by its cafeteria would not have been the same, day to day, as the food served at VMI. None of those differences would have been the result of a decision that overtly segregated by gender.

Similarly, the separate girls' teams in this case will inevitably play at different times, on different fields, against different opponents, and under different rules than the boys' teams do. Indeed, they frequently play entirely different sports (volleyball instead of football, for example). Even if plaintiffs succeed in moving the Michigan girls' basketball season to the winter, school principals will still have to decide what night and time to schedule the girls' and boys' games, and when to give each team use of practice courts, the school's weight room, or a particular coach that both would prefer. Indeed, consolidating girls and boys into the same season in every sport will greatly exacerbate such resource conflicts. If every difference is treated as a separate, facial gender classification requiring an "exceedingly persuasive justification," then everything from the use of pep bands to running fundraising raffles to selecting timekeepers and scorers will have constitutional ramifications. The ensuing litigation will be endless and separate facilities or programs for men and women—athletic teams, schools, prisons, even bathrooms—will, for all practical purposes, become unconstitutional.

The Sixth Circuit's holding conflicts with this Court's decision in *VMI*, and with decisions of the Third, Fourth, Eighth, and D.C. Circuits—all of which have recognized that differences in implementation between separate male and female programs are not themselves facial classifications, and are not presumptively unconstitutional. Only this Court can resolve that conflict.

In addition, this case presents the Court with an opportunity to resolve a separate longstanding circuit split over whether the comprehensive remedies created by Title IX preempt gender discrimination claims brought under 42

U.S.C. § 1983.[6] This Court explained in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981) ("*Sea Clammers*"), that when Congress enacts a comprehensive statutory regime that provides adequate protections for certain rights, Congress may intend to preclude plaintiffs from bringing such claims under § 1983. The Second, Third, and Seventh Circuits have all ruled that Title IX's comprehensive regime of remedies precludes a plaintiff from bringing a constitutional claim under § 1983 based on the same facts.[7] The Sixth, Eighth, and Tenth Circuits have each held the opposite,[8] establishing a square and acknowledged split.

I. THE SIXTH CIRCUIT APPLIED INTERMEDIATE SCRUTINY IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. Differences In Single-Sex Programs Are Constitutional Unless The Plaintiff Proves Discriminatory Animus, Or That The Programs Are Substantially Unequal Overall

This Court's cases have made quite clear that the Equal Protection Clause reaches only purposeful discrimination that can be demonstrated in several ways. A statute or policy may discriminate on its face by expressly classifying

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[6] A favorable resolution of this second issue for petitioner could, of course, prevent the Court from reaching the Equal Protection issues at all. If this Court considers it essential to resolve the Equal Protection issues, it can limit the grant of certiorari to the first question presented.

[7] *See Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Williams v. Sch. Dist.*, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996) (all holding that Title IX precludes constitutional claims brought under § 1983).

[8] *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) (all holding that Title IX does not preclude constitutional claims brought pursuant to § 1983).

persons on the basis of their race or gender because such classifications are presumptively the product of illegitimate motives. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227 (1995). Alternatively, a facially neutral statute or policy may be applied in such a hostile and discriminatory manner that it compels an inference of discriminatory intent. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Finally, a facially neutral decision that creates a disparate impact along gender or racial lines violates the Equal Protection clause if the plaintiff proves by a preponderance of the evidence that the decision was actually motivated by discriminatory animus. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). As this Court explained, "'discriminatory purpose'" "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (citation and footnote omitted).

This Court has indicated that separate facilities for men and women will sometimes satisfy intermediate scrutiny.[9] Separate facilities must of course be equal, but need not be identical.[10] Both the Fourth Circuit majority and dissent in *VMI* agreed that the test was whether the two programs "afford[ed] to both genders benefits comparable in

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[9] Even in *VMI*, this Court "d[id] not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities," including single-gender schools. 518 U.S. at 533 n.7. And it acknowledged that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Id.* at 550 n.19.

[10] This Court's precedents are somewhat unclear as to whether the requirement of substantial equality is separate from heightened scrutiny or merely a consequence of it—because providing unequal programs could not possibly be substantially related to any important state purpose. That theoretical distinction makes no difference for the present analysis.

substance, but not in form and detail." *United States v. Va.*, 44 F.3d 1229, 1240 (4th Cir. 1995); *cf. id.* at 1250 (Phillips, J., dissenting) (arguing that single-sex schools must have "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources"). In reversing, this Court cited with approval both Judge Phillips's "substantially comparable" formulation and the "substantial equality" or "substantially equivalent" test that it had applied in *Sweatt v. Painter*, 339 U.S. 629 (1950). *See VMI*, 518 U.S. at 547 n.17, 553-54; *see also id.* at 563-65 (Rehnquist, C.J., concurring) (equal protection does not require identical schools, but merely "two institutions [that] offered the same quality of education and were of the same overall caliber"). This Court held that "Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI." *Id.* at 554. This Court pointedly *did not* hold that every difference in the programs must *independently* satisfy intermediate scrutiny.

B. The Scheduling Decisions Challenged Here Should Not Be Characterized As Facial Gender Classifications

The Sixth Circuit's holding in this case radically expands the scope of intermediate scrutiny, and in practical terms will render all gender-separate programs untenable.

Plaintiffs do not challenge the only true facial classification at work in this case: the original decision to have separate high school sports teams for boys and girls. Because of the "enduring" physical differences between men and women, *VMI*, 518 U.S. at 533, separate teams are essential to any meaningful pursuit of equal athletic opportunities. But once the need for separate programs is conceded, decisions implementing those programs cannot be characterized as gender classifications. A high school principal classifies students according to gender if she decrees that boys cannot play on the girls' field hockey team. But she does not classify anyone by gender when she

orders the uniforms for that team (even if they are different from the boys' football uniforms) or gives that team use of the school weight room on Monday and Wednesday afternoons (even if the boys' football team is thereby relegated to Tuesdays and Thursdays). By the same token, a rule enforcing separate bathrooms for high school boys and girls may be a facial classification; but the school's decision to place the boys' bathroom to the left of the water fountain and the girls' bathroom to its right is not. Subjecting logistical decisions of that nature (which may be based on little more than a coin flip) to intermediate scrutiny is nonsensical.

Yet that is precisely what the Sixth Circuit did here. A decision to hold the girls' basketball tournament in December does not classify anyone by gender, any more than holding that tournament in March (plaintiffs' preferred alternative) would. These are simply dates on a calendar, like the lines on a map considered in *Shaw v. Reno*, 509 U.S. 630 (1993). This Court explained in *Shaw* that a districting statute "typically does not classify persons at all; it classifies tracts of land, or addresses." 509 U.S. at 646. The decisions challenged here similarly classify athletic contests—or, at most, members of particular sports teams. The fact that all the members of some teams are of one gender does not make the choice of a tournament date into a facial gender classification, especially since the same scheduling choice would have to be made if the teams were of mixed genders. Likewise, discrimination against pregnancy in insurance plans is not a facial gender classification even though only women become pregnant, *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), and civil service preferences for veterans are not facial classifications even if veterans are overwhelmingly men, *Feeney*, 442 U.S. at 274. Certainly the various athletic seasons chosen by Michigan schools are not on their face "so bizarre as to permit of no other conclusion" than that the MHSAA scheduled the post-season tournaments intentionally to disadvantage girls. *Shaw*, 509 U.S. at 646.

Plaintiffs therefore had two options: they could attempt to prove that the challenged scheduling decisions were in fact motivated by discriminatory animus (i.e., that these dates were chosen at least in part "because of," not merely "in spite of," any perceived disadvantages for female athletes), or that the separate athletic programs that Michigan high schools sponsor for girls and boys are not "substantially equal" under *VMI* and *Sweatt v. Painter*. They did neither. Instead, the district court and the Sixth Circuit improperly relieved them of those burdens by treating every decision implementing a program that happens to be single-gender as a facial gender classification, shifting the burden of proof to MHSAA and requiring an exceedingly persuasive justification. That methodology is a clear error of law, and an invitation to endless constitutional litigation over every trivial detail of how single-gender programs are implemented. For example, different school buses or uniforms for boys' and girls' teams, different sites for boys' and girls' schools, and different cafeteria menus or educational offerings at male and female prisons are all now *presumptively unconstitutional* in the Sixth Circuit.[11] This is a dramatic change in the scope of the Equal Protection Clause, and conflicts both with this Court's rulings and with those of other Circuits, as discussed below.

That is enough to justify review by this Court, and a reversal and remand under proper principles. It bears noting, however, that plaintiffs could not have carried their burden of proof, properly conceived. They made no effort to articulate a meaningful conception of what "substantial

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[11] In fact, the district court and Sixth Circuit did not merely treat every difference between the girls' and boys' schedules as a presumptively unconstitutional facial classification. They also required MHSAA to justify, under intermediate scrutiny, any differences between its girls' schedules and the schedules used for *girls in other states*. Michigan boys do not play volleyball at all, so the "discrimination" the courts below perceived in the girls' volleyball schedule was not by reference to the (nonexistent) boys' schedule, but to the practice for *girls* elsewhere.

equality" in overall athletic offerings would mean, or to evaluate whether Michigan's offerings satisfied it. The district court's conclusion that girls received "all of the disadvantageous playing seasons" among the six sports that plaintiffs chose to focus on, Pet. App. 98a, certainly is not equivalent to a finding that the overall athletic offerings of Michigan schools were not substantially comparable or equal under *VMI* and *Sweatt*. Michigan schools offer separate girls' and boys' teams in nine sports (basketball, golf, soccer, tennis, swimming, cross country, track, bowling and skiing), coed teams in four (baseball, hockey, football and wrestling), and teams limited *only to girls* in another four (softball, volleyball, gymnastics, and competitive cheerleading). And many of the "advantages" the district court identified in the boys' seasons are enjoyed by *girls* in other sports.[12]

And plaintiffs presented no evidence that would support a finding that MHSAA adopted these particular schedules "because of," not merely "in spite of," any perceived disadvantages to its female athletes. To the contrary, MHSAA vigorously disputed plaintiffs' contention that the supposed "disadvantages" exist at all. MHSAA sincerely believes that the challenged schedules are tangibly *better* for girls overall than the alternatives proffered by plaintiffs. The district court disagreed (after a wide-ranging foray into athletic policy-making disguised as constitutional law), but did not find that MHSAA was motivated by gender animus. A fair review of the district court's opinion makes it clear that these judgments are debatable. And most of the purported advantages for boys identified by the district court had nothing to do with the schedules chosen for either

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[12] For example, the district court found that girls are "disadvantaged" because their basketball, swimming and diving, and tennis seasons are shorter. But the girls have longer seasons in golf and soccer. Pet. App. 58a-59a, 63a-64a. The district court thought it an advantage that the spring tennis season for boys flows naturally into summer club play. *Id.* at 72a. But the girls' fall seasons in tennis and basketball follow right *after* summer play, which the district court held was an advantage for boys' golf. *Id.* at 65a.

gender's program or with the core educational goals of interscholastic athletic programs. MHSAA's member schools are pleased when their most elite athletes are recognized in private national rankings, and get the opportunity to participate in "shoot-outs" sponsored by shoe companies or private club competitions outside the interscholastic schedule. But their programs and schedules are designed to maximize overall participation and intelligent use of scarce facilities, not outside recognition of the state's most talented athletes.

C. The Sixth Circuit's Holding Conflicts With Decisions Of Other Circuits

The Sixth Circuit's opinion conflicts with decisions of the Third, Fourth, Eighth, and D.C. Circuits.

The court's reasoning in this case conflicts with the Fourth Circuit's decision in *VMI* for reasons discussed briefly above. Both the majority and dissent agreed in *VMI* that the issue was whether the overall educational experience offered by VWIL was substantially equal or substantially comparable to VMI. Neither treated particular differences between the two programs as presumptively unconstitutional facial gender classifications. Although this Court reversed the Fourth Circuit's conclusion that VWIL *was* substantially equal, it framed the issue similarly—and indeed cited both Judge Phillips's Fourth Circuit dissent and a similar formulation from *Sweatt v. Painter* with approval. *See VMI*, 518 U.S. at 547 n.17, 553-54.

For similar reasons, this case conflicts with the Third Circuit's decision in *Vorchheimer v. School District*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which upheld the constitutionality of separate male and female public high schools that were "similar and of equal quality," although different in some respects. (The district court had held "'that [generally] the education available to the female students ... is comparable,'" although the "academic facilities ... in the scientific field ... are superior" at the

boys' school. *Id.* (first alteration in original).) *Vorchheimer* is an older case, but it applied intermediate scrutiny in the alternative. *Id.* at 888.

The Sixth Circuit's reasoning also conflicts with a line of cases from the Eighth and D.C. Circuits evaluating differences between men's and women's prisons. In *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 513 U.S. 1185 (1995), a class of female inmates sued the state of Nebraska alleging that its women-only prison offered inferior vocational, educational, and employment opportunities, rehabilitation programs, and medical and psychological services compared to its men-only prisons. The district court held that Nebraska bore the burden of justifying any differences under intermediate scrutiny. Reversing, the Eighth Circuit majority pinpointed precisely the error committed by the Sixth Circuit in this case:

> The dissent and the district court both erroneously assume that this is a case involving a facial gender classification. There is simply no Nebraska statute or policy that distinguishes on its face between men and women as to prison programs. ... There is of course a facial classification in Nebraska prisons in that male and female inmates are segregated by institution, with the exception of the two integrated institutions. The plaintiffs, however, do not challenge this classification. The dissent and the district court apparently reason that if women are sent to [the women's prison] because of their sex that the programs they receive are necessarily based on their sex.
>
> ... [D]etermining whether the plaintiffs receive inferior programs because of their sex or for some other reason requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions.

31 F.3d at 734. The Eighth Circuit recognized that "female inmates can always point out certain ways in which male prisons are 'better' than theirs, just as male inmates can always point out other ways in which female prisons are 'better' than theirs." *Id.* at 732. That does not mean, however, that such differences are necessarily the result of intentional sex discrimination. *Id.* at 733. The Eighth Circuit held that the district court's analysis improperly "shifted the burden to the defendants to justify differences in prison programming," which "effectively relieved the plaintiffs of their burden of persuasion on the ultimate issue of discriminatory purpose." *Id.* at 734.

The Eighth Circuit revisited this issue in *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996), which challenged the placement of particular prison industries. The court acknowledged that the mix was different for men's and women's prisons, but held that the provision of particular work opportunities is facially neutral and refused to presume intentional discrimination. As in *Klinger*, "the women prisoners do not challenge the Department policy of segregating male and female prisoners by gender. Rather they challenge the Department policy which determines the placement of a particular prison industry at a specific penal facility." 100 F.3d at 650. The Eighth Circuit ruled that such decisions are not facial classifications, and that "it is appellants' burden to establish that the adverse effect this Department policy has on women inmates is the result of discriminatory purpose." *Id.* at 651.

In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997), the D.C. Circuit confronted a similar challenge to differences between men's and women's prisons. The D.C. Circuit noted that "the segregation of inmates by sex is unquestionably constitutional," and that plaintiffs had "not alleged that the District allocates fewer resources per female inmate." 93 F.3d at 926. Instead, they were "inviting this court to find that the District's decision to

provide male (but not female) inmates with access to any particular program violates equal protection principles." *Id.* The D.C. Circuit recognized that, under that reasoning, "any divergence from an identity of programs gives rise to equal protection liability." *Id.* It rejected that "program-by-program method of comparison," citing *Klinger* and this Court's decision in *VMI*.[13]

The Sixth Circuit committed precisely the error that the Eighth and D.C. Circuits reversed in the prison cases, and that the Third and Fourth Circuits avoided in *Vorchheimer* and *VMI*: it wrongly presumed that any differences between separate male and female programs were the result of facial gender discrimination, and hence presumptively unconstitutional. If this case had arisen in the Third, Fourth, Eighth, or D.C. Circuits, the court would have placed the burden on plaintiffs to prove an actual discriminatory purpose or true overall inequality, and MHSAA would have prevailed.

II. RESPONDENTS ARE BARRED FROM BRINGING AN ACTION UNDER § 1983 BECAUSE CONGRESS INTENDED TITLE IX TO PROVIDE THE EXCLUSIVE REMEDIES FOR THEIR CLAIMS

This case also provides the Court with the opportunity to resolve a longstanding and acknowledged circuit split over whether the use of § 1983 in this context is precluded by the comprehensive remedial scheme established in Title

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[13] The Eighth Circuit and D.C. Circuit cases also held that the male and female prisoners were not similarly situated, but their discussions of the discriminatory purpose issue are alternative holdings, not dicta. *See Klinger*, 31 F.3d at 733 ("Even assuming the inmates are similarly situated, however, that is merely the beginning of the analysis."); *Keevan*, 100 F.3d at 650 ("Even assuming, for the sake of argument, that male and female inmates were similarly situated ..., an equal protection review ... requires further analysis."); *Women Prisoners*, 93 F.3d at 926 ("Furthermore, our decision here is altogether consistent with the Supreme Court's most recent articulation of equal protection principles in [*VMI*].").

IX. The Court of Appeals declined to reach the Title IX issues in this case because it held that it could affirm the injunctive relief ordered by the district court solely under the constitutional theory. That was error, and conflicts with the settled law of the Second, Third, and Seventh Circuits.

A. Under The *Sea Clammers* Doctrine, Title IX's Comprehensive Regime Precludes Claims Under § 1983.

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). However, not every statutory or constitutional right can support a § 1983 claim. If Congress has intended that one statutory scheme be the exclusive method for vindicating a right, then plaintiffs must sue only under that statute.

In *Sea Clammers*, this Court held that other statutes may preempt suits under § 1983 "when the remedial devices provided in a particular Act are sufficiently comprehensive." 453 U.S. at 20. Whether § 1983 suits are precluded is a question of Congressional intent, and the state can show either that Congress precluded such suits expressly, through "specific evidence from the statute itself," *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987), or "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

Title IX contains a sufficiently comprehensive enforcement scheme that it forecloses the use of § 1983 to vindicate claims arising from alleged gender discrimination in schools. Two aspects of Title IX's enforcement regime compel this conclusion. First, Title IX contains a sweeping and complex administrative enforcement scheme. The Department of Education is required to investigate promptly an individual's allegations of a Title IX violation,

and is authorized to conduct compliance reviews and compel enforcement both through informal procedures and administrative hearings, ultimately by terminating the institution's funding. *See* 34 C.F.R. § 100.7.

Second, individual plaintiffs may bring private enforcement actions directly under Title IX. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979). Private plaintiffs suing under Title IX have access to a full spectrum of remedies, including injunctive relief and compensatory damages. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 73-76 (1992). The availability of private judicial remedies under Title IX is evidence of Congress's intent to displace § 1983 as an alternate source of remedies. *Wright*, 479 U.S. at 427.

Admittedly not every statutory scheme that might fairly be called "comprehensive" necessarily bars § 1983 suits. But in *Sea Clammers*, the relevant statute had both "unusually elaborate enforcement procedures" and also permitted private citizens to bring enforcement actions. 453 U.S. at 13-14. Both are true here.

In addition, educational institutions have traditionally relied on compliance with Title IX and its implementing regulations to fulfill their legal obligations. For example, a school with historically fewer opportunities for women need not have achieved a level of participation opportunities substantially proportionate to female enrollment, so long as the school can show "a history and continuing practice of program expansion." *See* Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). Nonetheless, under the Sixth Circuit's ruling, such a difference in participation opportunities is a facial gender classification that presumptively violates the Fourteenth Amendment unless the school offers an exceedingly persuasive justification. If § 1983 suits are allowed to circumvent Title IX, decades of reliance on compliance with Title IX will be threatened.

Although respondents' § 1983 claim focused on constitutional rather than statutory rights, there is no reason why Congress cannot establish a different vehicle than § 1983 for the enforcement of constitutional rights. As the Second Circuit has noted, neither *Sea Clammers* nor subsequent Supreme Court cases applying its teachings have ever distinguished between § 1983 actions that seek to enforce statutory as opposed to constitutional rights. *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 757-58 (2d Cir. 1998); *see also Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (Equal Protection claims under § 1983 subsumed by Education of the Handicapped Act because "Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education"). The question is whether Congress intended defendants' conduct to be redressed solely through a comprehensive statutory scheme outside of § 1983; with Title IX, it is clear it did.

B. The Sixth Circuit's Approach, Along With That Of The Eighth And Tenth Circuits, Creates A Square And Acknowledged Conflict With The Second, Third, And Seventh Circuits.

In 1996, the Sixth Circuit squarely held in *Lillard v. Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996), that Title IX did not preclude constitutional claims under § 1983. The Sixth Circuit expressly declined to follow the Third Circuit, which at the time was the only other court of appeals to have considered the issue. *See id.* at 723-24. The Sixth Circuit rejected the analysis of the Third Circuit and instead reasoned that plaintiffs sought to vindicate constitutional rather than statutory rights, and that Title IX did not provide a comprehensive enforcement scheme. *Id.*

The Eighth and Tenth Circuits have since agreed with the Sixth Circuit, and both acknowledged the circuit split. *See Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997), *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996). The Eighth Circuit focused on Title IX's remedial scheme

and concluded that Title IX remedies were a "far cry from" the elaborate remedies in *Sea Clammers*. *Crawford*, 109 F.3d at 1284. The Tenth Circuit held that the *Sea Clammers* doctrine does not apply to constitutional claims brought under § 1983. *Seamons*, 84 F.3d at 1233-34.

In contrast, the Third Circuit has consistently held that Title IX's comprehensive remedies demonstrate Congressional intent to displace § 1983. *See Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3d Cir. 1993); *see also Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Two other circuits have since joined the Third Circuit. The Seventh Circuit examined the comprehensive remedies of Title IX and held that

> [t]he provision of these remedies suggests that Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution. Through the establishment of this statutory regime, Congress effectively superseded a cause of action under § 1983 that was based on constitutional principles of equal protection.

Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 863 (7th Cir. 1996).

The Second Circuit has likewise concluded that Title IX's "complex administrative enforcement scheme" and the private causes of action that give a Title IX plaintiff "access to a full panoply of remedies including equitable relief and compensatory damages" evince an intent by Congress to displace § 1983. *Bruneau*, 163 F.3d at 756. The Second Circuit also held that "nothing in *Sea Clammers* ... would support a constitutional rights exception." *Id.* at 757. Indeed, the Second Circuit found support in this Court's cases for the conclusion that there is no special exemption for § 1983 actions raising constitutional claims. *Id.* at 758 (citing *Smith*, 468 U.S. at 1011-12).

Thus, MHSSA would have prevailed on the § 1983 claim at issue here in the Second, Third, and Seventh Circuits.

And there is no obstacle to resolving that conflict in this case.[14] If this Court concludes that the Title IX remedy is exclusive, a remand for further proceedings would be necessary.[15]

III. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

The questions presented by this case have broad significance to the educational community. Decisionmakers and lower courts must have guidance concerning the difference between a facial classification and implementing decisions in single-sex programs. The Sixth Circuit's holding that defendants must supply an "exceedingly persuasive justification" for every individual difference between such programs will subject school administrators (and athletic directors, coaches, prison officials, and anyone else administering gender-segregated facilities) to the constant threat of litigation for every decision they make. It is no longer enough to justify having separate teams or

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[14] In light of controlling circuit precedent, petitioner did not raise this issue below. To do so would have been futile. *See Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) (panel decisions are binding). The court of appeals however necessarily passed on the preclusion issue since, consistent with its precedent, it addressed the merits of the Equal Protection claim. *Cf. United States v. Williams*, 504 U.S. 36, 43 n.4 (1992) (court of appeals' application of its own precedent, without objection, preserves an issue for review).

This Court in any event has jurisdiction to review issues that were not addressed by the lower court, *e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976), and has recognized good reason to do so where, as here, it would have been futile for petitioner to argue this issue. *See, e.g., Grosso v. United States*, 390 U.S. 62, 70-71 (1968) (failure to raise Fifth Amendment claim below excused because of its futility in light of prevailing law); *Leary v. United States*, 395 U.S. 6, 27-29 (1969) (failure to raise objection to constitutionality of the statute was futile in light of prevailing law).

[15] Indeed, petitioners are likely to prevail under a proper analysis of Title IX. The district court failed to analyze the factors germane to claims of discrimination under Title IX based on scheduling, *see* Policy Interpretation, *supra*, 44 Fed. Reg. at 71,418, and failed to recognize that compliance is assessed in relation to "program-wide benefits and opportunities." *Id.* at 71,422.

schools or prisons for each gender; the Sixth Circuit's opinion means that every subsequent difference no matter how minor is now presumptively unconstitutional, and must be justified by the state under heightened scrutiny. Separate programs cannot thrive in that legal environment, which even the plaintiffs concede serves no one's interests. The question has become especially important in view of the renewed interest in establishing single-sex educational options at the elementary school level, with the express encouragement of the U.S. Department of Education.[16]

The *Sea Clammers* issue also merits review. Congress plainly did not intend for the details of implementing gender equality in high school athletics to be worked out by the courts through abstract constitutional litigation under § 1983. It instead delegated authority for the promulgation of comprehensive regulations under Title IX—regulations which recognize the importance of single-gender teams, provide a framework for evaluating the overall equality of athletic offerings, and should have governed this case. This recurring issue is dividing the lower courts, is squarely presented here because the Sixth Circuit below relied solely on the § 1983 claim, and has been sufficiently explored by the lower courts to warrant resolution now. School officials must know whether Title IX compliance provides a safe harbor for their decisions on whether they must have an exceedingly persuasive justification for every difference in their single-sex programs.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

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[16] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276, 11,277 (proposed Mar. 9, 2004) (to be codified at 36 C.F.R. pt. 106) (proposing regulations "to provide more flexibility for educators to establish single-sex classes and schools at the elementary and secondary levels"); *see also* Fredrick Kunkle, *Maryland School Segregates to Boost Achievement*, Wash. Post, Jan. 8, 2005, at B01 (noting that 154 public U.S. schools are offering single-sex programs this school year).

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, on behalf of itself, its members and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated,
Plaintiffs-Appellees,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., on behalf of itself and its members,
Defendant-Appellant.

No. 02-1127

Argued: June 17, 2004.
Decided and Filed: July 27, 2004.
Rehearing En Banc Denied November 9, 2004.

Before: KENNEDY and GILMAN, Circuit Judges; SHADUR, District Judge.*

OPINION

GILMAN, Circuit Judge.

Communities for Equity—an organization of parents and high school athletes that advocates on behalf of Title IX compliance and gender equity in athletics—and the individual plaintiffs (collectively, CFE) brought a class

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* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

action lawsuit against the Michigan High School Athletic Association (MHSAA), arguing that MHSAA's scheduling of high school sports seasons in Michigan discriminated against female athletes on the basis of gender. The district court concluded that MHSAA's actions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Educational Amendments of 1972, and Michigan's Elliott-Larsen Civil Rights Act. For the reasons set forth below, we AFFIRM the judgment of the district court with regard to the plaintiffs' Equal Protection claim, thus finding no need to reach the Title IX and state-law issues.

I. BACKGROUND

A. Factual background

At issue in this case is whether MHSAA's scheduling of athletic seasons and tournaments for six girls' sports—basketball, volleyball, soccer, Lower Peninsula golf, Lower Peninsula swimming and diving, and tennis—violates the law. With the exception of golf, all of these sports are scheduled during the nontraditional season (meaning a season of the year that differs from when the sport is typically played). *Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n.*, 178 F.Supp.2d 805, 807 (W.D.Mich.2001). Although Lower Peninsula girls' golf is played in the spring—the traditional season for golf—the fall season, when the boys play, is more advantageous. *Id.* No boys' sports are scheduled in nonadvantageous seasons. *Id.* at 838.

Girls have historically played in the less advantageous seasons because of the way that high school athletics developed in Michigan. MHSAA's executive director, John Roberts, explained in a 1990 article titled *Sports and Their Seasons*, published in MHSAA's Bulletin, that "[b]oys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program." *Id.* at 815.

In its findings of fact, the district court painstakingly discussed each sport at issue and analyzed why play in the nontraditional season (or, in the case of golf, in the traditional season) harmed female athletes. *Id.* at 817-836. Among the harms found by the district court are the following:

> [G]irls' basketball [is played] in the fall. Forty-eight states schedule girls' basketball in the winter....
>
> Michigan's female high school basketball players do not get to participate in "March Madness" or the excitement and publicity surrounding this time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments....
>
> Kristi Madsen said that not being able, as a high school basketball player, to participate in the "March Madness" hype made her feel "[a]ngry. I didn't like it. Again, the guys get a ton of special perks or attention because it's 'March Madness' and because they are playing in March, during 'March Madness.'"...
>
> Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season....
>
> [I]t is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on 'equal footing' with Michigan boys and with girls in the rest of the country with respect to collegiate recruiting....
>
> In volleyball, the non-traditional season is the disadvantageous season for girls....

Michigan high school girls' volleyball is played in the winter season.

The traditional playing season for women's volleyball is the fall. Forty-eight states play high school girls' volleyball in the fall. The NCAA schedules women's volleyball in the fall. Although the MHSAA does not currently sponsor boys' volleyball, the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball.

College volleyball recruiting focuses on the amateur, private club programs, like those sponsored by an organization called the United States Volleyball Association (USAV), rather than the high school programs ...

The USAV and AAU, another private club program, seasons for high school age players to play in their amateur programs are from January through June or July. MHSAA rules prohibit athletes from participating in USAV or AAU club volleyball during their December through March high school season.

Michigan girls who participate in high school volleyball are not able to participate in USAV club volleyball until April, after the MHSAA season has ended, while players in other states have been playing club volleyball since January. The MHSAA prohibits students from playing on any team other than a school team during the MHSAA-defined season in that sport. By the end of the MHSAA season, most of the regional and national USAV tournaments have been filled by non-Michigan teams. When there are

openings, Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing...." Michigan club teams have difficulty excelling at these tournaments because they are becoming accustomed to playing with new teammates and a new coach while their competitors have already been playing together for four months. It is therefore more difficult for recruiters to evaluate Michigan players at these tournaments....

[T]he Court finds that the spring season is the inferior season, as compared to fall, for playing soccer in Michigan....

The NCAA schedules women's soccer in the fall....

The MHSAA schedules the boys' soccer state championship tournament in the fall, at the same time that the NCAA schedules men's soccer....

The MHSAA's scheduling of girls' soccer in the spring in Michigan disadvantages girls in several ways. Soccer fields in Michigan are often still frozen or snow-covered when the girls' season starts in the spring, so girls are forced inside for practice and tryouts. Thus, the regular season starts later than scheduled. As a result, Michigan girls must play three games a week over the course of the season to make up postponed games whereas Michigan boys play two games per week over the course of their season.

The increased number of games per week causes a greater risk of injury for girls that Michigan boys do not face....

Girls' opportunities for collegiate recruitment are decreased because college scholarships for soccer are awarded in November and April. Recruiters will not have had an opportunity to see female soccer players in Michigan in their senior year of high school before awarding first-round November scholarships because girls start their competitive season in late March. Michigan boys play during the fall season and are able to have four years of high school competition for college recruiters to consider....

The court finds that in Michigan, fall is the more advantageous season for playing high school golf....

Lower Peninsula girls' golf [is played] in the spring season....

Lower Peninsula boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses. The MHSAA scheduled Lower Peninsula girls' golf in the spring, which was the season it had previously determined was less advantageous when it moved boys' golf.

In addition, because the NCAA letter of intent signing date is in early November, Michigan boys have four years of golf experience and scores on which to be evaluated. Michigan girls only have three years because their season occurs after the letter of intent signing date ....

> The Court finds that the winter season for swimming has advantages that outweigh advantages to swimming in fall....
>
> [T]he Lower Peninsula girls' swimming and diving season [is] in the fall.
>
> [The] Lower Peninsula boys' swimming and diving season [is] in the winter.
>
> [T]he winter season is more advantageous than fall for swimming. For one reason, Michigan boys are able to go straight from the high school swimming season to the club tournaments, whereas Michigan girls have a gap in competition because their season has ended in November. Sectional and regional swim meets for U.S. Swimming take place in March. The Phillips 66 national swim championships are in March/April of each year. In diving, junior nationals are in March, so girls face a gap in competition between the end of their fall interscholastic season and open amateur competition....
>
> [T]he Court finds that spring is the more advantageous playing season for tennis....
>
> [Michigan] girls' tennis [is played] in the fall.
>
> Boys' high school tennis immediately precedes the United States Tennis Association (USTA) summer tennis tournament circuit, so boys have the advantage of high school practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play....

Id. at 817-836.

In addition to sport-specific harms, the district court found that the scheduling of seasons harmed Michigan girls

in ways that could be generalized across all sports. For example, "[w]hen girls are treated unequally as compared to boys, girls receive the psychological message that they are 'second-class' or that their athletic role is of less value than that of boys." *Id.* at 837.

The above-quoted findings are only a fraction of the harms that the district court found are experienced by female athletes in Michigan because of MHSAA's scheduling their seasons of play at disadvantageous times. A full recounting takes up 30 pages of the district court's opinion. *Id.* at 809-39.

MHSAA was founded in 1924 "to exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." *Id.* at 810 (quotation marks omitted). MHSAA's Articles of Incorporation further illuminate that the purpose of MHSAA is

> to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with [the] educational values of the high school curriculums...

Id. at 811 (quotation marks omitted). Membership in MHSAA is open to all secondary schools in Michigan. To join MHSAA, a school district's board of education must agree to adopt MHSAA's rules and regulations "as its own and agree[] to primary enforcement of such rules as to its own schools." *Id.* (quotation marks omitted). Over 700 Michigan schools constitute the membership of MHSAA, more than 80% of which are public. *Id.* at 810.

Ticket sales to the state championship tournaments represent 86% of MHSAA's budget. *Id.* at 813. MHSAA member schools remit substantial portions of the gate receipts from their participation in the tournament events to MHSAA. *Id.* Other sources of revenue include tournament concessions, fees from the registration of game officials, advertising in tournament programs, corporate sponsorship,

and royalties from television and radio broadcasts of MHSAA tournament events. *Id.*

General control over interscholastic athletic policies is vested in the Representative Council. *Id.* at 812. Nineteen voting members constitute the Council, fourteen of whom are elected by member schools, four of whom are appointed by the Council, and one of whom is a representative of the State Superintendent of Education. *Id.* All members of the Council, with the exception of the representative of the State Superintendent, must be either members of the faculty or board of education of MHSAA-member schools. *Id.* Seventeen of the nineteen members of the Council in 2000-2001 were either employees or representatives of public schools or public school districts. *Id.*

The district court found that high school athletic seasons in Michigan are determined by MHSAA. *Id.* at 814. MHSAA prescribes when practice and competition may start, when competition ends, and the maximum number of games that may be played. Practice outside of the dates set by MHSAA is prohibited. Member schools are not permitted to engage in any competition after the end of the MHSAA season or the end of the state championship tournament in any sport, whichever is last. According to MHSAA rules, athletes may not participate in both interscholastic and amateur club sports in the same sport during the same season. Within the MHSAA-determined seasons, member schools set their own practice schedules and game dates. *Id.*

State championship tournaments are sponsored by MHSAA in twelve boys' sports and twelve girls' sports. *Id.* Only MHSAA-member schools who comply with MHSAA's rules and regulations may participate in these tournaments. *Id.*

B. Procedural background

In June of 1998, CFE filed the present lawsuit, alleging that MHSAA discriminated against female athletes. The district court denied two successive motions for summary judgment filed by MHSAA. MHSAA then filed a motion to

dismiss, which was granted in part, dismissing all of CFE's disparate-impact claims.

From September 24 through October 4, 2001, the district court conducted a bench trial on the remaining claims. The court handed down its decision on December 17, 2001, holding that MHSAA's scheduling of female sports seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX (20 U.S.C. §§ 1681-1688), and Michigan's Elliott-Larsen Civil Rights Act (Mich. Comp. Laws Ann. §§ 37.2101-37.2804). *Cmtys. for Equity*, 178 F.Supp.2d at 862.

As part of its ruling, the district court enjoined MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan. The court retained jurisdiction over the case, ordering MHSAA to submit a Compliance Plan so that an appropriate remedy could be implemented. *Id.* MHSAA's initial Compliance Plan was rejected by the court, but a revised plan was filed by MHSAA in October of 2002 and subsequently approved.

II. ANALYSIS

A. Standard of review

Questions of constitutional interpretation are issues of law, which we review de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir.2004). The district court's findings of fact, on the other hand, will not be set aside unless they are determined to be clearly erroneous. *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519 (6th Cir.2003).

B. Equal Protection

1. State action

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Pursuant to 42 U.S.C. § 1983,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

An entity or individual charged under § 1983 with a Fourteenth Amendment violation must be a "state actor." *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir.1995) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.") (quotation marks and citation omitted). As a threshold issue, therefore, we must determine whether MHSAA is a state actor.

In determining that MHSAA is a state actor, the district court relied upon the United States Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). *Cmtys. for Equity*, 178 F.Supp.2d at 846-848. The *Brentwood Academy* case addressed the issue of whether the Tennessee Secondary School Athletic Association (TSSAA), which was "incorporated to regulate interscholastic athletic competition among public and private secondary schools," engaged in state action when it enforced one of its rules against a member school. *Id.* at 290, 121 S.Ct. 924. Because of "the pervasive entwinement of state school officials in the structure of the association," the Court held that TSSAA's regulatory activity constituted state action. *Id.* at 291, 121 S.Ct. 924. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry," *id.* at 298, 121 S.Ct. 924 (quotation marks omitted), and noted that

state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295, 121 S.Ct. 924 (quotation marks omitted).

Public schools constituted 84% of TSSAA's membership, the Court noted, and school faculty and administrators provided TSSAA's leadership. *Id.* at 298, 121 S.Ct. 924. The Court was also influenced by the fact that TSSAA's primary revenue source was gate receipts from tournaments between TSSAA-member schools. *Id.* at 299, 121 S.Ct. 924. In conclusion, the Court stated that,

> to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. at 299-300, 121 S.Ct. 924. The Court also found significant that TSSAA ministerial employees were treated like state employees by virtue of their eligibility for membership in the state retirement system. *Id.* at 300, 121 S.Ct. 924.

MHSAA's stated purpose, "[t]o create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state," is virtually identical to that of its Tennessee counterpart. *See id.* at 290, 121 S.Ct. 924. Like TSSAA, MHSAA's membership is composed primarily of public schools. And, similar to TSSAA, public school teachers, administrators, and officials dominate MHSAA's leadership. Another common feature is that the bulk of MHSAA's revenue comes from ticket sales for state

championship tournaments. Finally, MHSAA employees who had state teaching certificates were, until January of 1988, considered state employees and were therefore eligible to participate in the state's retirement system. Employees who started working for MHSAA before January of 1988 continue to be members of the state employees' retirement system. *Cmtys. for Equity*, 178 F.Supp.2d at 813.

We therefore conclude that MHSAA is so entwined with the public schools and the state of Michigan, and that there is "such a close nexus between the State and the challenged action," *Brentwood Academy*, 531 U.S. at 295, 121 S.Ct. 924 (quotation marks omitted), that MHSAA should be considered a state actor. Tellingly, MHSAA argued earlier in this litigation, before the Supreme Court reversed this court's opinion in *Brentwood Academy*, 180 F.3d 758 (6th Cir.1999), that "the nature and function of the MHSAA is virtually identical to that of the TSSAA." *Cmtys. for Equity*, 178 F.Supp.2d at 847. MHSAA, in sum, has failed to present any compelling argument to distinguish itself from TSSAA. We therefore affirm the determination of the district court that MHSAA is a state actor.

2. Denial of Equal Protection

The Supreme Court has held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (dealing with the admission of women to the Virginia Military Institute, hereafter referred to as *VMI*). In *VMI*, the Court further explained the State's burden under the heightened standard for gender-based classifications:

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the

> reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33, 116 S.Ct. 2264 (quotation marks and citations omitted).

The district court analyzed the scheduling of the Michigan athletic seasons under *VMI's* standard, determining that MHSAA had to show that scheduling team sports in different seasons based on gender "serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." *Cmtys. for Equity*, 178 F.Supp.2d at 850. In addition, the district court noted that MHSAA's justifications must be "exceedingly persuasive." *Id.* (quotation marks omitted). MHSAA asserted that the scheduling decisions were designed to maximize girls' and boys' participation in athletics, arguing that the scheduling system maximizes opportunities for participation "by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team." *Id.*

Conceding that MHSAA's logistical concerns were important, the district court concluded that MHSAA had failed to demonstrate, pursuant to the standards set forth in *VMI*, that discriminatory scheduling was "'substantially related' to the achievement of those asserted objectives."

Id. at 850-51. MHSAA's reliance upon anecdotal and "weak circumstantial" evidence was found insufficient to carry its burden. The district court also pointed out that *even if* MHSAA had sufficiently proven the point about athletic-participation opportunities, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." *Id.* at 851.

On appeal, MHSAA reiterates its argument made below that the purpose of separate athletic seasons for boys and girls is to maximize opportunities for athletic participation. MHSAA asserts that statistics showing that Michigan has a higher number of female participants in high school athletics than most states satisfies the requirements of *VMI*. An "unavoidable consequence of separate teams," according to MHSAA, "was accommodation of twice the number of teams, games and participants."

The evidence offered by MHSAA, however, does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. MHSAA argues that bare participation statistics "*are the link* showing that separate seasons are substantially related to maximum participation." (Emphasis added.) But a large gross participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives.

MHSAA also contends that it cannot be liable under the Equal Protection Clause because there is no evidence that MHSAA acted with discriminatory intent. It points out that "[t]here is no evidence that MHSAA [] scheduled [] sports seasons because of 'sexual stereotypes' or as a result of any discriminatory purpose or intent." This argument appears to confuse intentional discrimination—i.e., an intent to treat two groups differently— with an intent to harm. As stated above, Equal Protection analysis requires MHSAA to show

that its disparate treatment of boys and girls "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *VMI*, 518 U.S. at 533, 116 S.Ct. 2264.

Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *VMI* imposes no requirement upon CFE to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls. The cases that MHSAA cites to the contrary, such as *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), are inapposite because they involve facially neutral classifications, rather than facially gender-based classifications. In *Hernandez*, for example, the Court analyzed a racially-neutral explanation for a prosecutor's exercise of peremptory strikes in picking a jury, noting that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360, 111 S.Ct. 1859. The facts of the present case are quite different from those of *Hernandez*.

In sum, we do not find that MHSAA's justification for its scheduling practices is "exceedingly persuasive" in meeting the heightened standard required by *VMI* for the gender-based classifications. *See VMI*, 518 U.S. at 532-33, 116 S.Ct. 2264. We therefore affirm the district court's grant of relief to CFE on the Equal Protection claim.

C. Compliance Plan

Upon finding that MHSAA's scheduling of high school athletic seasons violated the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act, the district court ordered MHSAA to "bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year." *Cmtys. for Equity*, 178 F.Supp.2d at 862. MHSAA was

required to submit a Compliance Plan to the court by June 24, 2002. *Id.*

After MHSAA filed its proposed Compliance Plan, CFE and the Department of Justice filed responses, arguing that MHSAA's plan failed to remedy the inequities that existed in the scheduling of Michigan's high school athletics seasons. The Department of Justice noted that "the proposed Compliance Plan would perpetuate sex discrimination by requiring more than three times as many girls as boys to play in disadvantageous seasons and by addressing only sports, with the exception of boys' golf, offered by less than half of MHSAA's member schools."

In August of 2002, the district court rejected MHSAA's proposed plan as not achieving equality. The court offered MHSAA three options:

> (1) combine all sports seasons so both sexes' teams play in the same season ... and move girls' volleyball to its advantageous season of fall; or (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue.
>
> MHSAA selected the second option in the amended Compliance Plan that it filed with the district court in October of 2002. The amended plan was approved by the court the following month.

MHSAA contends that the district court erred in rejecting MHSAA's initial Compliance Plan. Before we can address the merits of this argument, however, we must

determine whether appellate jurisdiction exists to hear the issue.

CFE argues that MHSAA failed to appeal the Compliance Plan order, pointing out that MHSAA's January 2002 Notice of Appeal references only the opinion, judgment, and injunctive order entered in December of 2001. MHSAA did not file an amended Notice of Appeal following the district court's rejection of its initial Compliance Plan in August of 2002.

The appellate courts lack jurisdiction over issues that are the subject of post-judgment motions, such as a motion for a new trial, when arguments in those motions are not included in a Notice of Appeal. In *United States v. Warner*, 10 F.3d 1236 (6th Cir.1993), for example, this court held that "by being a distinct appealable order from which a separate appeal must be taken," a denial of a motion for new trial

> is subject to the requirement that the appeal be taken within ten days from the docketing of the district court's order. Absent an appeal within this time, or an extension from the district court for filing the notice of appeal, this court, being without authority to extend the time for filing a notice of appeal, will lack the jurisdiction to hear the appeal.

Id. at 1240.

MHSAA did not file an amended Notice of Appeal following the district court's rejection of the initial Compliance Plan. We therefore conclude that this court lacks jurisdiction to consider MHSAA's argument concerning the rejection.

D. Judge Enslen's refusal to recuse himself

The final issue raised by MHSAA relates to the involvement of the district judge in the present case, Judge Enslen, in a case filed by MHSAA over twenty years ago. In 1983, MHSAA filed suit in the Western District of Michigan against the United States Department of Education and the Office of Civil Rights in the case of

Michigan High School Athletic Association v. Bell, No. 83-CV-6250-AA. Judge Enslen recused himself from the 1983 case for reasons that no one, including Judge Enslen, can presently recall. MHSAA nevertheless argues that because Judge Enslen recused himself then, he should have recused himself now.

The record before us does not explain why Judge Enslen recused himself from the 1983 case, but, in denying MHSAA's motion for disqualification, Judge Enslen stated that he could think of no reason why he would be unable to remain impartial. Judge Enslen also noted that "only one of the 21 Defendants in the current case was a party to the 1983 case, and none of the class Plaintiffs in the current case was involved in the 1983 case." Because MHSAA failed to provide any valid basis for Judge Enslen's recusal, we affirm the ruling of the district court in denying MHSAA's motion. *See Person v. General Motors Corp.*, 730 F.Supp. 516, 518-19 (W.D.N.Y.1990) (stating that recusal in a prior case involving a party is not alone sufficient for disqualification in a later case involving that same party).

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court on the basis that MHSAA's actions regarding the scheduling of girls' sports seasons in Michigan violated the Equal Protection Clause of the Fourteenth Amendment.

UNITED STATES DISTRICT COURT,
W.D. MICHIGAN,
SOUTHERN DIVISION.

COMMUNITIES FOR EQUITY, et al., Plaintiffs,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant

No. 1:98CV479.

Dec. 17, 2001.
As Corrected Dec. 21, 2001.

OPINION

ENSLEN, District Judge.

"Change is the only constant. Hanging on is the only sin." -Denise McCluggage, U.S. race car driver, as quoted in *WomenSports* magazine, June 1977, at 18.

After a three and one-half year legal struggle, this case is finally ready for resolution. It began on June 26, 1998, when Plaintiffs, an organization named Communities for Equity and two mothers of female student-athletes suing on behalf of their minor daughters, filed a class action lawsuit alleging that the Michigan High School Athletic Association (MHSAA), MHSAA's executive director, and members of the MHSAA Representative Council[1] discriminated against female athletes.

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[1] MHSAA's executive director and members of the Representative Council have been referred to throughout the litigation as the "Individual Defendants." Plaintiffs' claims remain against only Defendant MHSAA,

Plaintiffs alleged that the discrimination against high school female athletes took a variety of forms, specifically naming seven areas of discrimination against female athletes. Once this case wound its way to bench trial before the Court, only one area of alleged discrimination remained for the Court's decision. The sole remaining area of alleged discrimination is the allegation that Defendant MHSAA schedules athletic seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling of girls' athletic seasons constitutes legally inequitable treatment.

The scheduling of the girls' sports at issue involves volleyball in the winter, basketball in the fall, soccer in the spring, Lower Peninsula golf in the spring, Lower Peninsula swimming and diving in the fall, and tennis in the fall.[2] Specifically, Plaintiffs claim that all of these girls' sports, with the exception of girls' golf, are played in a non-traditional season, i.e., a season of the year different from when the sport is typically played, and that the non-traditional season is a disadvantageous time of the year to play the sport, causing inequities for girls. Lower Peninsula girls' golf is played in golf's traditional season of spring, but Plaintiffs claim that in the case of golf in Michigan, the non-traditional season of fall is far superior to the spring season, and fall is when Lower Peninsula Michigan boys play golf.

Plaintiffs' federal claims arise under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983; and Title IX of the Education Amendments of 1972, 20

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and not the Individual Defendants, who were dismissed from the lawsuit on a motion made pursuant to Fed.R.Civ.P. 52(c). (10/2/01 Order, Dkt. No. 507.)

[2] In the Upper Peninsula of Michigan, boys' and girls' golf are both played in the spring, and boys' and girls' swimming and diving are both held in the winter, so only the Lower Peninsula scheduling of these two sports is at issue in this lawsuit.

U.S.C. §§ 1681 *et seq.*, (Title IX). Plaintiffs' state law claim arises under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2101 *et. seq*, specifically those sections barring discrimination in schools and in public accommodations and services. The Court has jurisdiction over Plaintiffs' state law claim through its supplemental jurisdiction.

Plaintiffs seek declaratory and injunctive relief and attorneys' fees. In terms of injunctive relief, Plaintiffs ask that the District Court require that male and female teams of the same sport be scheduled to play in the same season and that girls' volleyball be scheduled to play in the fall. In the alternative, if the Court finds adequate justification for scheduling female and male seasons differently, Plaintiffs ask this Court to require Defendant MHSAA to schedule the same number of male and female sports in non-traditional seasons, "so as to allocate the benefits and burdens of playing in different seasons equally between females and males."

Defendant MHSAA argues that its placement of the girls' sports seasons at issue is advantageous for female athletes and thus not discriminatory. The MHSAA also asserts that legitimate reasons exist for scheduling some male and female teams of the same sports in different seasons, reasons which mostly encompass asserted logistical difficulties in putting more students in one season.

The United States was granted *amicus curiae* status to brief the Court and participate in the trial on the issues of federal law presented. (9/7/00 Order, Dkt. No. 255.) The United States argues in favor of Plaintiffs' position in this matter.

A bench trial over eight days was held to allow the Court to hear from witnesses and to receive documentary exhibits in order to determine what the facts are and what legal conclusions are to be drawn from those facts. During this time, the Court heard from twenty-five witnesses and received 103 exhibits.

Federal Rule of Civil Procedure 52 requires that in cases tried without a jury, the Court shall make findings of fact separately from its conclusions of law. Fed.R.Civ.P. 52(a). Findings of fact shall not be set aside unless clearly erroneous. *Id.*

Much has been said in this case about what a "traditional" season is and what a "non-traditional" season is. For most sports, it is common knowledge when tradition dictates that a sport will be played. Ask almost any woman or man on the street when organized football, on any level, is played, and that person is sure to know that football is a fall sport.

In this case, the Court cares about traditional sports seasons only to the extent that a traditional season, or the season when the sport is usually played at most levels, happens to be the most advantageous playing season for the high school sports at issue in this case. So if girls play sports in non-traditional seasons when boys play in traditional seasons, that does not necessarily break the law, if girls and boys are equally advantaged by the season in which they play a sport.

But a tradition does not become a tradition simply because of random coincidence. A particular playing season often becomes the traditional season for a particular sport in the first place because certain advantages accrue to playing a sport in a certain season. For example, there is a reason why outdoor organized sports like soccer, tennis and football are not played in the winter in Michigan. Similarly, there are other reasons, perhaps less obvious to the casual observer than Michigan weather, why certain sports are not generally played in certain seasons.

The question for this Court is not whether the process through which the MHSAA came to the decisions that it has to schedule girls' sports where it does was fair. The question for this Court is also not whether this Court believes that the scheduling decisions of the MHSAA were wise. The question for this Court is whether the scheduling

decisions made by the MHSAA are legally permissible, and the Court has come to the conclusion that they are not. The MHSAA's seasons decisions are not permitted under the Fourteenth Amendment to the United States Constitution, Title IX, or Michigan's Elliott-Larsen Civil Rights Act.

The Court finds in favor of Plaintiffs and will order appropriate remedies as described herein.

FINDINGS OF FACT

I. THE PARTIES

A. Plaintiffs, Diane Madsen, Jay Roberts-Eveland, and Communities for Equity

Plaintiff Diane Madsen is a teacher for Kentwood Public Schools in the Grand Rapids area. (Trial Transcript[3] (Tr.) at 14:12-19, Diane Madsen Testimony.) Ms. Madsen filed suit on behalf of her three daughters, Katie, Kristi and Kelsey Madsen, who were all minors at the time the suit was filed. (*Id.* at 14:24-15:6; Stipulated (Stip.) Fact No. 28.) The Madsen daughters have participated in or are currently participating in high school sports at Grand Rapids Northview High School, a MHSAA member school. (Stip. Fact No. 15.) Katie, currently attending Aquinas College in Grand Rapids, played basketball and volleyball; Kristi, currently attending Cornerstone University, also in Grand Rapids, played softball, basketball, volleyball, tennis and was a member of the swim and dive team; and Kelsey, currently a junior at Northview High School, plays basketball and volleyball. (Tr. at 15:7-16:2, D. Madsen; Tr. at 90:15-22, Kristi Madsen.)

Ms. Madsen is also president of Plaintiff Communities for Equity (CFE). (Tr. at 23:22-24:12, D. Madsen.) Ms. Madsen testified that she viewed a number of areas in her children's school's girls' sports programs as highly

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[3] Citations are to the transcript prepared daily by the Court's Official Court Reporter Kathleen S. Thomas for the parties during trial.

inequitable, compared to boys' sports programs, and she subsequently became interested in changing the situation. (*See, e.g., id.* at 16:7-19:7.) Ms. Madsen and other parents with similar concerns at other schools began to meet to discuss the issue, and CFE was formed. (*Id.* at 23:6-21.)

CFE was founded by parents and student-athletes in 1997 "to educate people about the compliance of Title IX, about gender equity in general in athletics, and to advocate for the compliance of Title IX." (Tr. at 23:3-28:25, D. Madsen.) CFE works toward this goal by distributing a "parental tool kit" for parents and students to learn about Title IX, and by speaking to groups throughout Michigan. (*Id.* at 25:14-20, 26:14-27:2; Trial Exhibit (Tr. Exh.) 51 (CFE Tool Kit: "A Parental Guide to Title IX and Gender Equity in High School Athletics").) In addition, CFE advocates its position with various parties, including the MHSAA, to whom CFE complained about the current scheduling of seasons for girls, including sending CFE's position papers and examples of harms that CFE feels result for girls under the status quo. (*See* Tr. Exhs. 57-59.)

Plaintiff Jay-Roberts Eveland has filed suit on behalf of her daughters, Kele and Breanna, who were both minors at the time this lawsuit was filed. (Tr. at 372:19-22, Kele Eveland Testimony; Tr. at 633:14-17, Breanna Eveland Testimony; Stip. Fact No. 30.) Ms. Eveland is also vice-president of CFE. (Tr. at 24:9-15, D. Madsen.) The Eveland daughters have participated or currently participate in high school sports at East Kentwood High School, a MHSAA member school. (Stip. Fact No. 15.) Kele, currently attending Georgia Tech University on an athletic scholarship for volleyball, played volleyball and basketball in high school. (Tr. at 374:17-21, K. Eveland.) Breanna, currently a senior at East Kentwood High School, plays basketball and volleyball and runs track. (Tr. at 634:15-23, B. Eveland.)

This lawsuit has been certified as a class action. Madsen, Eveland, and CFE represent a class of all present and

future female students enrolled in MHSAA member schools participating in interscholastic athletics or deterred from participating because of Defendant MHSAA's allegedly discriminatory conduct, and who are adversely affected by that conduct. *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 192 F.R.D. 568, 570 (W.D.Mich.1999).

B. Defendant Michigan High School Athletic Association

Defendant Michigan High School Athletic Association (MHSAA) acts as the governing body for interscholastic sports in the State of Michigan. The MHSAA is an incorporated membership organization. (Tr. Exh. 28 (MHSAA Articles of Incorporation).) Its Articles of Incorporation describe the MHSAA's purpose as follows:

> To create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with the educational values of the high school curriculums, the interest in physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent hereof.

(Tr. Exh. 28; Stip. Fact 1.)

The MHSAA membership is comprised of over 700 Michigan high schools, over 80 percent of which are public. (Tr. Exh. 9(a) at 13 (2000-01 MHSAA Handbook); MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 5 (served 7/28/99).) Put another way, all of Michigan's public high schools with qualifying interscholastic athletic programs, with the exception of

some charter schools, are MHSAA members. (*Compare* Tr. Exh. 12 (1999-00 MHSAA Member School Directory) *with* Tr. Exh. 26 (Michigan Department of Education's list of public high schools).) Nearly all of MHSAA's member schools are recipients of Federal financial assistance. (*Compare* Tr. Exh. 12 *with* Tr. Exh. 25 (Michigan Public School District Directory).)

The MHSAA was founded in 1924 "to exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." (Tr. Exh. 116 at 3 (1978-79 MHSAA Handbook Foreword).) Historically, the interscholastic athletic programs of all Michigan public schools were supervised and controlled by either the Michigan Superintendent for Public Instruction or by the State Board of Education. *See* School Code of 1955, 1955 P.A. 269, § 784; Mich. Comp. Laws § 388.1014 (2001). The MHSAA was housed within the Michigan Department of Education, and its Executive Director was known as the "State Director of Athletics." (Tr. Exhs.115, 117.) The MHSAA's handbook, rules, and regulations were part of the Administrative Code of the State of Michigan. (Tr. Exh. 118.)

In 1972, the Michigan Legislature amended the School Code to move the authority for interscholastic athletics from the State Board of Education to the boards of individual school districts, permitting the districts to join the MHSAA as long as a representative of the State was a member of the MHSAA's governing body. 1972 P.A. 2, § 379 (repealed 1976); Mich. Comp. Laws § 380.1289 (1976) (amended 1995). Also, the Michigan Legislature designated the MHSAA as the "official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and [decreed that it] shall be responsible for the adoption and enforcement of rules relating to eligibility of athletes in schools for participation in interschool athletic events, contests and tournaments." *Id.*

The MHSAA incorporated itself in 1972 "to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with educational values of the high school curriculum." (Tr. Exh. 28 at 2 (Articles of Incorporation); Stip. Fact No. 1.) Membership in the MHSAA is open to all secondary schools in Michigan. (Tr. Exh. 9(a) at 15 (2000-01 MHSAA Handbook, Constitution, art. II, § 1).) To join the MHSAA, a school's board of education must agree to adopt MHSAA rules and regulations "as its own and agree[] to primary enforcement of such rules as to its own schools." (*Id.* at 15 (Constitution, art. II, § 2).) Membership may be denied or delayed to schools who engage in "practices and behaviors ... that are in opposition to [MHSAA's] regulations and principles for interscholastic athletics." (*Id.* at 14 ("How to Join the MHSAA").)

In 1995, the Michigan Legislature amended the School Code again, removing the MHSAA's official designation, but confirming that school districts were still authorized to "join organizations [such as the MHSAA] as part of performing the functions of the school district." Mich. Comp. Laws § 380.11a(4) (2001). The 1995 amendment resulted in no substantive changes in the structure or operation of the MHSAA or in its relationships with its member schools.

The MHSAA regulates interscholastic athletic competition between member schools and sets standards for school membership and eligibility of students to participate in interscholastic athletics. For example, the MHSAA has adopted playing rules and regulations for each MHSAA-sanctioned sport. (Tr. Exh. 9(a) at 50 (Regulation II, § 8).) These regulations "apply in sub-varsity, as well as varsity, interscholastic scrimmage as well as games, and regular season as well as MHSAA tournaments." (*Id.* at 26; Tr. Exh. 14 at 7 (1999-00 MHSAA Coaches Guidebook, p. 5) ("Schools shall adhere to the playing rules adopted by the MHSAA to govern games and meets in baseball, basketball, competitive cheer, cross country, football, golf, gymnastics,

ice hockey, soccer, softball, skiing, swimming and diving, tennis, track and field, volleyball and wrestling.").) Further, the MHSAA must approve any meet or tournament held in Michigan involving three or more teams sponsored by a nonmember school, and if such an event is approved, it must be conducted pursuant to MHSAA rules. (Tr. Exh. 9(a) at 47-48 (Regulation II, § 5(A) and Interpretation No. 157).)

MHSAA rules state that any person coaching an interscholastic team "SHOULD be a member of the regular teaching staff or the school district." (Tr. Exh. 9(a) at 46 (Regulation II, § 3) (capitalization in original).) Non-faculty member coaches must register with the MHSAA prior to assuming any coaching duties. (*Id.*; Tr. Exh. 21(f) (MHSAA Non-Faculty Coach Registration Form).)

In all MHSAA-sanctioned sports except tennis and golf, the MHSAA requires its member schools to use only MHSAA-registered game officials to officiate athletic contests in which teams from those schools participate. (Tr. Exh. 9(a) at 49 (Regulation II, § 7).) To register as an official, a person must complete an application form indicating which sports he or she will officiate, pass a written examination on MHSAA rules and regulations, and pay a registration fee to the MHSAA. (Tr. Exh. 20(a) (MHSAA memorandum to "Prospective MHSAA Officials"); Tr. Exh. 20(b) (MHSAA Officials Registration Application).)

The MHSAA limits participation in interscholastic athletics to "eligible" students. (Tr. Exh. 9(a) at 46 (Regulation II, § 1).) To be eligible to play, a student must, among other things, be younger than age 19, have passed at least four full credit courses during the previous semester, be currently passing four full credit courses, and have passed a physical examination. (*See id.* at 27-45 (Regulation I—"Essential Eligibility Requirements for Senior High School Students"); Tr. Exh. 18 (MHSAA pamphlet summarizing eligibility rules).)

Member schools who violate any of the MHSAA's rules are subject to a wide range of penalties, including censure,

probation, bans from regular season competition and MHSAA tournaments, forfeiture, and expulsion. (Tr. Exh. 9(a) at 78 (Regulation V, § 4).) MHSAA has adopted a "due process procedure" for investigating alleged violations and assessing penalties, which includes adequate notice to the party being investigated, written findings, and the right of appeal. (*Id.* at 21-23 (Due Process Procedure).) MHSAA actively enforces its rules and regulations. (MHSAA's Answers to Plaintiffs' Second Request for Admissions, Response No. 37 (served 7/29/99).)

"[G]eneral control of interscholastic athletic policies" is vested in the Representative Council, according to the MHSAA's Constitution. (Tr. Exh. 9(a) at 18 (Constitution, art. VI, § 1).) The Council is composed of nineteen voting members, of which fourteen individuals are elected by member schools, four individuals are appointed by the Representative Council, and one is a representative of the state superintendent of education. (*Id.* at 15 (Constitution, art. IV, § 1).) Except for the state representative, membership in the Representative Council is limited to faculty and board of education members of each member school. (Tr. Exh. 9(a) at 16.) Council members must resign their positions if they end their position at member schools. (Tr. Exh. 9(a) at 13, 15-17.)

The fourteen elected members of the Representative Council are elected by vote of the member schools. (Tr. Exh. 9(a) at 13.) In 2000-01, seventeen of the nineteen members of the MHSAA Representative Council were employees or representatives of public schools or school districts. (*See* Tr. Exh. 9(a) at 6-7 *compared with* Tr. Exh. 25 (Michigan Public School District Directory).)

The MHSAA has an Executive Committee, comprised of five Representative Council members, three elected officers and two members appointed by the president. (Stip. Fact 6.) One of the Executive Committee's powers is to "[m]ake all rules necessary for the effective control and government of interschool activities consonant with the legislation

enacted by the Representative Council and with this Constitution ...." (Tr. Exh. 9(a) at 18.)

The Executive Director of the MHSAA is "the executive officer in control of Senior High School and Junior High/Middle School interscholastic athletics." (Tr. Exh. 9(a) at 19.) The Executive Director is also responsible for investigating, deciding, and penalizing violations of the MHSAA's rules and regulations. (*Id.*) Decisions of the Executive Director are "subject to review by the Executive Committee and/or the Representative Council, upon appeal by the Administration of the Member School or Schools involved." (*Id.*)

Most of the MHSAA's revenue is derived from state championship tournaments. Approximately 86 percent of the MHSAA's budget comes from the sale of tickets to its tournament events. (Tr. Exh. 16 at 2 (Flyer-"This is the MHSAA").) Member schools remit a substantial portion of the gate receipts from their participation in the state championship tournaments to the MHSAA. (*See* Tr. Exhs. 37(a)-(h) (MHSAA Financial Report Forms from MHSAA Tournaments).) For example, in 1997, Rockford High School hosted a regional football playoff which grossed $14,948 in admissions; $12,208 (82 percent) was remitted to the MHSAA. (Tr. Exh. 37(a).) The remainder of the MHSAA's revenue comes from tournament concessions, fees for the registration of officials, advertising in tournament programs, corporate sponsorship, and royalties from radio and television broadcasts of MHSAA tournament events. (Tr. Exhs.35-37.)

The MHSAA issues broadcast policies on radio and television coverage for both regular season and post-season tournaments. "The Representative Council ... passed a regulation effective August 1, 1989, prohibiting live television originations of regular-season athletic events involving member schools." (Tr. Exh. 21(a) at 3.) MHSAA rules also state that "[n]o school may televise live—or may grant on a complimentary or fee basis to either a profit or

nonprofit entity the rights to televise live on commercial, subscription or independent stations or networks—any interscholastic event in which any MHSAA member school is a participant in any MHSAA Tournament sport." (Tr. Exh. 9(a) at 59 (Regulation II, Section 14(B)).) Schools participating in broadcast events do not receive any portion of the broadcast royalties. (Tr. Ex. 20(a)). Finally, member schools host many of the tournament games and provide employees to manage those game sites. (*See* MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 7 (served July 28, 1999).)

Until January 1, 1988, MHSAA employees with state teaching certificates were considered state employees eligible to participate in the state retirement system. Mich. Comp. Laws § 38.1347(1) (1987). Employees who began with the MHSAA before that date still have membership in the state employees' retirement system. Mich. Comp. Laws § 38.1347(1)-(2) (2001).

The Representative Council appoints committees which make recommendations to the Council on seasons and other issues, recommendations which are rejected or approved by the Council. (*Id.* at 944:13-945:1.) Further, as a condition of membership, schools are obligated to follow all of the MHSAA rules; put simply, "it's a take it or leave it proposition." (Tr. at 867:11-15, K. McGee.)

Many member schools belong to leagues or conferences which also regulate interscholastic athletics to some degree. (Tr. at 785:16-788:5, K. McGee.) But all conference rules must comply with MHSAA rules, since the schools are also MHSAA members. (*Id.* at 863:14-864:1; Tr. at 164:4-10, L. Kostreva; Tr. Exh. 222, at 2, 6-9.) The Big Nine Athletic Conference Constitution, for example, prescribes that "failure to join MHSAA will result in automatic exclusion from membership in the league." (Tr. Exh. 222 at 6 (Big Nine Athletic Conference Constitution).)

The MHSAA determines when seasons occur. The MHSAA prescribes when practice may begin, when

competition may begin, when competition must end, and the maximum number of games that may be played. (Tr. Exh. 9(a) at 54-55 (Regulation II, § 11(A)).) Member schools are prohibited from practicing outside of the dates set by the MHSAA calendar. (Tr. Exh. 9(a), at 54-61, 109-110; Tr. Exhs. 63, 83.) Member schools may not participate in any competition beyond the end of the MHSAA season or state championship tournament in any sport. (*Id.* at 59 (Regulation II, § 12).) For example, for the 2000-01 school year, the MHSAA prohibited girls' basketball teams from practicing before the week of August 15, limited teams to 20 games and four scrimmages for the season, and required teams "to terminate practice and competition on or before the final date of the MHSAA sponsored ... tournament." (Tr. Exh. 9(a) at 54-55 (Regulation II, §§ 11(A), 11(B), and 12).)

Schools, with the assistance of conferences and leagues if they are a part of one, set only the practice schedule and game dates within a season. In addition, MHSAA rules prohibit member school athletes from participating in both interscholastic sports and amateur club sports in the same sport in the same season. (Tr. Exh. 14, at 4; Tr. Exh. 9(a) at 43-44.)

The MHSAA also limits the scope of permissible activities "outside of the MHSAA-defined season for a sport." (Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)).) Sports activities during that time cannot use school transportation, school uniforms, or school district funds; hold mandatory practices or games; or involve more than three players from the same school team if the coach is also present. (*Id.*)

The MHSAA sponsors state championship tournaments in twelve boys' sports and twelve girls' sports. (Tr. Exh. 16 at 3 (Flyer—"This is the MHSAA").) These state-wide tournaments are open only to MHSAA member schools who comply with MHSAA's rules and regulations. (Stip. Fact No. 14; MHSAA's Answers to Plaintiffs' First Request for Admissions, Response No. 12 (served July 28, 1999); Tr.

Exh. 9(a) at 76 (Regulation V).) "[O]nly those teams playing a sport during a current season will be eligible to enter the MHSAA meet or tournament in that sport. For example: Girls golf teams playing in the fall season will not be eligible to enter the Girls Regional Golf Tournament in the spring." (Tr. Exh. 9(a) at 60 (Regulation II, § 15, Interpretation No. 214).)

The very nature of interscholastic athletics necessitates a controlling entity like the MHSAA. (Tr. Exhs.22, 115.) The structure provided by the MHSAA as Michigan's governing body is necessary for appropriate organization of interscholastic athletics. "[I]t would be chaos" with "a system of high school sports where there is not a level playing field ... by when [schools] compete against each other." (Tr. at 869:8-14, Kathleen McGee Testimony; Tr. Exh. 22 at 3 (MHSAA document explaining that in contrast to non-athletic activities such as music and drama, central control and a "statewide regulatory body" is necessary to the success of interscholastic athletics).) Indeed, 90 percent of high schools in the state of Michigan and 60 percent of the junior high/middle schools are members of MHSAA. (Tr. Exh. 16 at 2.)

II. THE SCHEDULING HISTORY OF GIRLS' SPORTS

John Roberts, the MHSAA's current executive director, has written, "Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program. While this allowed for the best use of facilities, faculty and officials, it also led to an imbalance of girls' athletic opportunities across the three seasons of the school year." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).)

Until the early 1970s, before it was an MHSAA-sanctioned sport, girls played high school basketball in the winter at the same time boys' teams played. (Tr. at 576:1-

15, 577:20-25, Catherine Dritsas[4] Testimony.) In December 1970, the MHSAA received requests from certain schools for permission to start girls' basketball practice "before the established winter starting dates," to run girls' basketball in fall. (Tr. Exh. 33 at 2 ("Girls Basketball in Michigan," Sept. 1983 MHSAA Bulletin).) The reasons given for the request included "better use of the physical plants." (*Id.*; Tr. at 578:1-8, C. Dritsas.) After a hearing held on October 11, 1971 to discuss the topic, it was recommended that a rule permitting competition in girls' basketball at any time during the school year be adopted. (Tr. Exh. 33 at 2.) There is no indication whether this rule was adopted. (*See id.*) Presumably the rule was adopted, however, since an unknown number of girls' teams may have also been playing in the fall at some point before the MHSAA sponsored a tournament for girls' basketball. (*Cf.* Tr. at 772:6-10, K. McGee.)

The MHSAA held the first MHSAA girls' basketball tournament in fall 1973. (Tr. Exh. 27 at 6 (1972-73 MHSAA Bulletin, vol. XLLX [sic], at 422).) Surveys were submitted to schools to determine when they wanted the tournament held. (Tr. Exh. 33 at 2.) In 1976, the MHSAA's Girls' Basketball Committee recommended that the "Girls Basketball season move to the Winter and Girls Volleyball be played in the fall." (Tr. Exh. 78 at 1 (Minutes of 5/22/76 Girls Basketball Committee Meeting).)

The following year, the MHSAA merged the Girls' Basketball Committee into a single committee of boys' and girls' basketball coaches. (Tr. Exh. 78 at 3 (Minutes of 5/5/77 Basketball Coaches Committee Meeting).) By a vote of 11-2, the newly-constituted Basketball Coaches Committee voted

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[4] Ms. Dritsas coached girls' basketball at the Academy of Sacred Heart in the Detroit area from 1969 to 1997. (Tr. at 575:1-5, C. Dritsas.) She was inducted into the Michigan High School Coaches Hall of Fame in 1993. (*Id.* at 575:13-17.) She was called to testify by the United States.

to keep boys' basketball in the winter and girls' basketball in the fall. (*Id.*)

Some schools attempted to continue playing girls' basketball in the winter. (Tr. at 580:5-14, C. Dritsas.) Within a couple of years, however, these schools had to move girls' basketball to the fall because they "didn't have anybody to compete against and the girls were denied the opportunity of any state tournament competition." (*Id.*)

The MHSAA noted in 1983, in "Girls Basketball in Michigan," that "[i]t is alleged that girls and boys are not treated equally because of the split seasons; but it is quite obvious, based on the surveys, that school administrators believe a split season in boys and girls basketball is the very best way to meet the needs of interscholastic athletic competition for both boys and girls." (Tr. Exh. 33 at 2.)

Prior to 1971-72, the MHSAA scheduled boys' golf in the spring. The MHSAA moved the boys' season to the fall to obtain "the use of better courses on Saturdays." (Tr. Exh. 29 at 2 (1973-74 MHSAA Bulletin, vol. L, p. 5)). In 1976, the Representative Council decided to conduct the girls' tournament on Mondays instead of Saturdays "since Saturdays are days in which it is extremely difficult to acquire courses for participation." (Tr. Exh. 10(b) at 3 (1976 MHSAA Bulletin, at 6).) The following year, the Sports Season Committee reconsidered recommending to the Representative Council that it switch girls' golf from the spring to the fall, but the vote was defeated within the committee by a narrow margin. (Tr. Exh. 87 (5/4/77 Sports Season Committee Meeting Minutes at 16).)

In 1981, the Representative Council decided to schedule boys' and girls' soccer together in the fall, "based on the survey of schools, as well as the financial advantage to schools in conducting the sport during the same season for boys and girls." (Tr. Exh. 47 at 3 (Minutes of 12/9/81 Representative Council Meeting at 393).) In fact, sixty member schools voted for separate seasons for the sexes in soccer, but eighteen schools voted for a combined season.

(Tr. Exh. 229 (1981 Survey—Soccer).) However, most schools (507) expressed no preference, and many apparently did not vote. (*Id.*) After being asked by several school administrators to reconsider its decision, the Representative Council "determined that, beginning with the 1982-83 school year, a Boys Soccer Tournament would be scheduled in the fall and a Girls Soccer Tournament would be scheduled for the spring." (Tr. Exh. 10(d) at 5 (Minutes of 3/28/82 Representative Council Meeting).)

In May 1990, the MHSAA recognized that girls' participation opportunities in the winter season were lacking. "[G]irls' athletic opportunities in the winter are in almost every Michigan high school, inadequate compared to boys' opportunities in the winter and girls' opportunities in the fall and spring." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).) Consequently, the MHSAA took the "first step" to remedy this inequity "by changing Lower Peninsula girls swimming and diving from the fall season to the winter." (*Id.*) Thirteen years earlier, in 1977, the MHSAA's Sports Season Committee had recommended to the Representative Council that it "change the girls swimming season to coincide with the boys season in the winter." (Tr. Exh. 87 at 1 (5/4/77 Sports Season Committee Minutes).)

In November 1990, the MHSAA reversed the decision to move girls' swimming and diving to the winter and decided to study, among other things, "the most opportune placement of the girls and boys swimming seasons in the Lower Peninsula" and "the most opportune placement of other sports currently regulated by MHSAA (volleyball, basketball and golf for girls and soccer for boys are frequently discussed)." (Tr. Exh. 81 at 1 (John Roberts, "Sports and Their Seasons," 1990-91 MHSAA Bulletin).) This reversal was due to opposition, at least in part, by fifty schools and the Michigan Interscholastic Swim Coaches Association (MISCA). (Tr. Exh. 45 at 236; Tr. at 1196:2-24, Greg Phill Testimony.)

Following its reversal, the Representative Council "reaffirmed the need to continue discussing sports seasons." (Tr. Exh. 95 at 9-11 (4/23/91 Memorandum Regarding "Pro-Active Approach to Expanding Athletic Opportunities for Girls in the Winter Season").) This discussion led to a proposal that the MHSAA move "slowly and deliberately to examine the placement of several existing programs" while at the same time considering whether to sponsor new winter activities for girls. (*Id.*)

The MHSAA was aware that it could be held legally liable if girls' sports seasons were found legally inequitable. The proposal to study seasons was "made mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon." (Tr. Exh. 95 at 9.)

Of the three winter activities that it considered, bowling, indoor track and competitive cheerleading, MHSAA decided to adopt cheerleading for girls in 1994. (Tr. Exh. 95 at 10; Tr. Exh. 9(a) at 26; Tr. Exh. 98.)[5] With respect to moving existing seasons, the Representative Council was informed by the author of an MHSAA document that "it is important for the long term that the MHSAA conduct without fanfare a comprehensive study of sports seasons," including (1) "switching girls and boys Lower Peninsula swimming seasons by the year 2000;" (2) "combining boys and girls golf into a single coed program by the year 2000 (and possibly doing the same for tennis);" and (3) "switching girls

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[5] John Roberts, MHSAA Executive Director, said in his column "Sports and Their Seasons" in a 1990-91 MHSAA Bulletin, "No one sport can solve all the historical inequities, and no sport can be above consideration as a part of the future solution. Cheerleading cannot be considered in the solution. While cheerleading is certainly a part of the total experience available to boys and girls in the winter, merely defining cheerleading as a sport and counting it toward athletic opportunities for girls in the winter does not satisfy Federal regulations when analyzing opportunities for boys vs. girls in interscholastic sports." (Tr. Exh. 81.)

volleyball and basketball seasons by the year 2000." (Tr. Exh. 95 at 11.)

That memo, of April 23, 1991, also "proposed that the Representative Council give the directive to the MHSAA staff in May *to work quietly but steadily through the state's athletic and educational communities for however long is necessary to find and/or forge consensus regarding these and other ideas.*" (*Id.* (unclear whether emphasis in original).) There is no evidence that the MHSAA studied the sports season issue as recommended, and MHSAA has implemented none of the proposed changes detailed above.

Finally, the MHSAA does not currently sponsor boys' volleyball. But the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball. (Tr. Exh. 79 at 2 (Excerpts from Spring 1997 MHSAA Representative Council Meeting Agenda).)

III. SPORT-SPECIFIC FACTS

A. Girls' Basketball

The Court determines that there are a number of specific disadvantages to playing basketball in the fall. After hearing the evidence, the only potential advantage is the possibility that the opportunity for recruitment to play collegiate basketball may be increased because college women's coaches may be able to see teams that play in the fall more often and with fewer NCAA recruiting restrictions. However, the MHSAA did not offer any evidence to prove that this translated into more scholarships or spots on collegiate basketball teams than Michigan girls would otherwise receive.

Regardless, moving girls' basketball to the traditional winter season would still give girls exactly equal opportunity to be recruited for collegiate play as boys' basketball players. Moreover, there is only circumstantial evidence that Michigan girls playing in the winter would not

be recruited at the same level that the MHSAA asserts that they are in fall. Finally, the Court finds that girls were originally scheduled to play basketball in the fall to avoid inconveniencing the boys' basketball team, and that kind of historical stigma should be erased.

1. General Disadvantages to Playing in Fall

In 1999-2000, 19,760 girls played basketball for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the girls' basketball state championship tournament in the fall. (Stip. Fact No. 41.) For 2001-02, the MHSAA set the first practice date for August 13, the first contest date for August 27, and the end of the season as December 1. (Tr. Exh. 9(a) at 113.) This places the girls' basketball season in the fall. Forty-eight states schedule girls' basketball in the winter. (Tr. Exh. 256.)[6] The National Collegiate Athletic Association (NCAA) also schedules college women's basketball in the winter. (Tr. Exh. 40 at 2.)[7]

The MHSAA schedules the boys' basketball state championship tournament in the winter. (Tr. Exh. 9(a) at 113). For 2001-02, the MHSAA set the first practice date

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[6] Until recently, 44 states scheduled girls' volleyball in the fall and girls' basketball in the winter. As a result of litigation, three additional states will also be switching seasons to this format. *Pederson v. South Dakota High Sch. Athletic Ass'n*, No. 00-4113 (D.S.D.) (consent decree); *Alston v. Virginia High Sch. League*, 176 F.R.D. 220 (W.D.Va.1997) (settlement agreement following jury verdict in plaintiffs' favor); *Ries v. Montana High Sch. Ass'n*, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000). A fourth state, North Dakota, has voluntarily agreed to switch the seasons. Jane Bos, *Michigan Soon Will Stand Alone; Four States Moving Girls Hoops to Winter*, The Grand Rapids Press, Aug. 26, 2001, at D10, *available at* 2001 WL 25385084 (reporting on North Dakota).

[7] As explained earlier, the traditional playing season for a sport is one hallmark that the season is an advantageous time to play the sport, but tradition is not dispositive. In the same manner, the season in which the NCAA sponsors a particular sport is a hallmark of a traditional, and thus advantageous, season, but it is only one, non-dispositive factor.

for boys as November 12, the first contest date for December 3, and the end of the season as March 23. (*Id.*) Winter is the season when high schools in the rest of the country play boys' basketball and when the NCAA schedules men's basketball. (Tr. Exh. 256; Tr. Exh. 40 at 2.) The traditional playing season for basketball is the winter. (Tr. at 497:1-4, D. Lopiano).[8]

Plaintiffs presented very credible evidence that the MHSAA's scheduling of girls' basketball in the fall disadvantages girls in several ways. Because Michigan girls play basketball in the fall season, they cannot participate in special events for professional or semi-professional teams, such as playing before or at half-time of a professional game, that take place during the traditional winter season. (Tr. at 99:8-100:8, Kristi Madsen Testimony.) Michigan's female high school basketball players do not get to participate in "March Madness" or the excitement and publicity surrounding this time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments. (Tr. at 98:1-23, Kristi Madsen[9]; Tr. at 114:20-115:21, Kelsey Madsen.[10])

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[8] Dr. Lopiano is executive director of the Women's Sports Foundation, whose mission is to expand and enhance opportunities for girls and women to participate in sports and leadership opportunities. (*Id.* at 485:1-11.) Dr. Lopiano, who testified as an expert witness for Plaintiffs, has a Ph.D. in athletic administration with a subspecialization in gender equity in sport. (*Id.* at 490:7-10.) She served as director of women's athletics at the University of Texas, and served on the NCAA committee that produced the first gender equity study for the NCAA. (*Id.* at 491:13-492:3.) At MHSAA's invitation, she has also spoken at MHSAA's Women in Sports Leadership Conference. (*Id.* at 492:4-13.) Further, she provided input in the drafting of the U.S. Department of Education's athletics regulations promulgated under Title IX. (*Id.* at 493:24-494:7.)

[9] Kristi Madsen testified for Plaintiffs. (Tr. at 90:1-4, Kristi Madsen.) Among the many sports she played at various points in high school, Ms. Madsen played four years of both volleyball and softball and three years of basketball. (*Id.* at 90:15-91:14.)

[10] Kelsey Madsen, a Northview High School junior, testified for Plaintiffs. She played basketball, volleyball and softball her first two

"March Madness" is the season of the year when basketball is the featured sporting event in the news media because of NCAA tournaments, and a number of promotional events promote basketball and basketball players. Kelsey Madsen testified that "for boys' basketball, it means tournaments and publicity for it and everyone is watching boys' basketball. It's a big hype for the season." (Tr. at 114:23-25, Kelsey Madsen.) High school girls' basketball in Michigan cannot similarly capitalize on the excitement that "March Madness" promotions create in the general public because they are not playing in March. Kelsey Madsen said, "I would love [playing girls' basketball during 'March Madness.'"] It would be awesome, just to know that you're part of something like that, to have an opportunity to play and be known in the season as like 'March Madness.' It's just everyone knows what it is. It would be good." (*Id.* at 115:16-21.) Kristi Madsen said that not being able, as a high school basketball player, to participate in the "March Madness" hype made her feel "[a]ngry. I didn't like it. Again, the guys get a ton of special perks or attention because it's 'March Madness' and because they are playing in March, during 'March Madness.'" (*Id.* at 98:19-23.) Moreover, attention is on the sport of football and the state football tournament in the fall, which is when girls play basketball. (*Id.* at 99:1-7, Kristi Madsen.)

Because Michigan girls do not play basketball in the winter and because Friday nights are dedicated to boys' football in the fall, girls often must play basketball during school nights on Tuesdays and Thursdays. (Tr. at 29:18-32:6, D. Madsen; Tr. at 93:16-94:9, Kristi Madsen (testifying that she and her teammates "had to bring homework to do at the games or on the bus because we had school the next day on both Tuesday and Thursday nights").) On the other hand, Michigan boys are able to play basketball on Tuesday and

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years of high school, and planned to play volleyball and softball her junior year. (Tr. at 111:3-20, Kelsey Madsen.)

Friday nights in the winter. If the girls played basketball during the traditional winter basketball season like the boys, girls would also have the opportunity to play games on Tuesday and Friday nights. (Tr. at 94:2-9, Kristi Madsen; Tr. at 518:1-7, D. Lopiano.)

Moreover, Michigan girls have decreased ability to be nationally ranked or obtain All-American honors because they play basketball during the non-traditional fall season. (Tr. at 501:17-502:2, D. Lopiano.) Dr. Linda Bunker[11] testified that Parade All-American team selections for high school basketball players are made in March. She further testified that "[i]f you play your high school basketball season in the fall, you're not even really eligible to be considered. I mean, you can be legally considered, but everybody's forgotten about you. It's a tremendous disadvantage." (Tr. at 706:1-6, Linda Bunker Testimony.) Not being able to participate in national team rankings and All-American honors "affects [Michigan girls'] visibility to recruiters in terms of college athletic scholarship opportunities." (Tr. at 501:25-502:2, D. Lopiano.) Ms. McGee counters that Michigan girls still can be and are nationally ranked in rankings like the USA Today National Poll and Parade All-American Team. (Tr. at 878:16-21, K. McGee.[12]) The MHSAA did not, however, provide any

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[11] Dr. Linda Bunker has a Ph.D. in kinesiology and sports psychology and is a tenured professor at the University of Virginia. (Tr. at 651:9-10, L. Bunker.) She was an expert witness for Plaintiffs. Dr. Bunker's research and scholarship focuses on the psychological aspects of sport and the way in which sport contributes to the lives of young boys and girls and men and women in contemporary society. (*Id.* at 651:14-18.) Besides being a member of several prominent professional sport psychology associations, Dr. Bunker has also received several distinguished awards. (*Id.* at 662:18-663:5.)

[12] Ms. McGee is athletic director and head girls' basketball coach at Flint Powers Catholic High School. (Tr. at 768:11-14, K. McGee.) She testified on behalf of the MHSAA. She has coached girls' basketball for twenty-nine years and been an athletic administrator for nine years. (*Id.* at 769:2-6.)

evidence that suggested that the ability to be ranked was not influenced by the fall playing season.

Girls also lose opportunities to participate in national shoot-outs such as the Nike and Blue Star shoot-outs. These shoot-outs occur in the fall when girls are participating in their high school basketball seasons. In fall 2001, there were eighteen Blue Star shoot-outs between September 16 and October 21 that Michigan girls could not attend because of the scheduling of their high school seasons in the fall. (Tr. at 911:18-913:5, S. Guevara.)

The boys' high school basketball season is approximately three weeks longer than the girls' season, giving boys a greater opportunity to practice and play. (Tr. at 499:23-500:5, D. Lopiano; Tr. Exh. 63 (1998-99 MHSAA Quick Reference Calendar).) Michigan girls, unlike Michigan boys, cannot compete against teams in neighboring states because girls in those states play basketball in the traditional winter season. (Tr. at 503:10-18, D. Lopiano; Tr. at 175:12-22, L. Kostreva (testifying that Menominee boys play basketball against Wisconsin high schools during the MHSAA regular season).) Playing against teams in neighboring states can also lessen travel burdens. (*See id.* at 171:25-172:8, 175:12-22, 198:7-14 (testifying that Menominee boys need only travel five minutes to play certain Wisconsin schools whereas girls must travel an average of 90 minutes to play other Michigan schools).)

2. Recruiting

The testimony regarding the effect that the placement of the girls' basketball season in the fall has on college athletic recruitment opportunities conflicted. The MHSAA argued that Michigan girls have special advantages in being recruited to play on collegiate teams by playing high school basketball in the fall, which are discussed *infra*. Even if this were true, however, it is undisputed that if Michigan girls played basketball during the winter season, they would, at the very least, be on "equal footing" with Michigan boys and with girls in the rest of the country with respect to

collegiate recruiting. (Tr. at 851:21-852:4, K. McGee; Tr. at 910:12-16, Sue Guevara Testimony).

Ms. McGee testified that "it's very easy to get [the] kids [she coaches] evaluated in the fall." (Tr. at 795:9-14, K. McGee.) While the Court places a good deal of weight on Ms. McGee's impression given her experience in coaching girls' basketball, her testimony must also be considered in light of Flint Powers' status as "one of the most successful" girls' basketball teams in Michigan whose "experiences [might be] different from the run-of-the-mill programs in the state." (*Id.* at 825:14-23.)

Another MHSAA witness on this issue, head University of Michigan (U of M) women's basketball coach Sue Guevara, testified that recruiting in basketball begins long before an athlete's senior year and can, in some cases, start as early as before the ninth grade. (Tr. at 887:19-888:6, 899:17-900:1, S. Guevara.) Ms. Guevara testified that she sees many other women's basketball coaches from around the country, including from prestigious women's basketball programs, at the top girls' games in Michigan, since before the beginning of October, attending high school games does not count against the forty "contact" limit placed on coaches by the NCAA.[13] (Tr. at 886:7-17, S. Guevara.) In addition, it is more convenient for college coaches to attend high school games during this time since the women's college practices have not started yet. (Tr. at 886:22-887:1, S. Guevara). Ms. Guevara indicated that these factors result in more visibility for Michigan's girls to be recruited, and that she believed that she and her staff would not have the same opportunities to watch and evaluate Michigan girls if they

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[13] For purposes of recruiting for collegiate basketball, a "contact period" is when a college coach may contact the athlete and her parents, and coaches are allowed three of those contacts after the period begins. (Tr. at 888:17-19, S. Guevara.) An "evaluation" is when the coach watches the athlete play or asks the athlete's high school for the athlete's transcript. (*Id.* at 888:20-24.)

play in the winter season. (*Cf.* Tr. 885:18-20; 891:17-892:19, S. Guevara.)[14]

On the other hand, Plaintiffs point out that to the extent that college basketball recruiting occurs at club tournaments in the fall, Michigan girls cannot play at such tournaments, and therefore cannot be seen by out-of-state recruiters at those events. (Tr. at 911:18-913:5, S. Guevara (testifying that 18 Blue Chip tournaments occur in the fall at which she evaluates and recruits players).) Ms. Guevara's response to Michigan girls' inability to attend these fall tournaments was that "they don't need to." (*Id.* at 913:3-5.) Michigan college coaches are also still able to attend summer AAU basketball tournaments, where every women's college

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[14] Ms. Guevara also testified that of the forty evaluation days given to women's basketball programs, U of M's program has used between twenty and twenty-five of its annual evaluation days on Michigan girls. (Tr. at 891:5-16, S. Guevara.) It is unclear to the Court, however, whether that number of days would still be used on Michigan girls if the season of play was switched to winter, since U of M women's basketball would obviously continue to use all forty allowed days to evaluate players. The change to winter would not necessarily mean that fewer days than are used now would go to Michigan girls, since they would be playing at the same time that almost every other girls' team in the nation is. Presumably, U of M also has some level of commitment to recruiting Michigan girls since U of M is a public university. But the Court is clear on Ms. Guevara's general point that she believes that Michigan girls would not be at the same recruiting advantage by playing in the winter.

The MHSAA also provided circumstantial evidence of its recruiting advantages argument by asserting that fifteen female recipients of the Miss Basketball title, given to the top player in the state annually, have played collegiate basketball at out-of-state colleges and universities, whereas only six Mr. Basketballs have done so. (Tr. at 777:4-778:6, K. McGee; Tr. Exh. 285.) The Court places very limited weight on this evidence, and certainly much, much less weight than the testimony of Ms. Guevara. These lists of where the single best player in Michigan was recruited do not prove that recruitment is increased for girls playing in the fall, but is only weak circumstantial evidence of that conclusion. If recruitment were increased, the list does not explain if the fall season alone is the reason or if other factors are present, to what extent all other female basketball players in Michigan are recruited besides the single best player, or what effect moving the season to the winter would have.

basketball program is in attendance. (Tr. at 905:9-14, 909:4-7, S. Guevara.)

Plaintiffs also argued that if Michigan girls played in the winter, college coaches would still be able to recruit them just as they recruit girls outside of Michigan. For example, the University of Michigan's women's basketball team plays on Thursdays and Sundays in the winter. (Tr. at 892:1-8, S. Guevara.) If Michigan girls played in the winter on Tuesdays and Fridays—as Michigan boys do—U of M's coaching staff would be able to attend Michigan girls' high school games on those days, even if they conflict with U of M's practice times.

NCAA recruiting restrictions prevent college coaches from watching and evaluating basketball players during "quiet periods" and "dead periods," as defined in the NCAA Manual. (Tr. Exhs.5, 7, 65-66.) During the winter season, however, the NCAA does not set any quiet periods. Instead, the "evaluation period," when players can be observed off-campus, runs October 8-February 28, and the "contact period," when off-campus, in-person recruiting contacts can be made, runs March 1-26. (Tr. Exh. 5 at 3-4; Tr. Exh. 7 at 9.)[15] Thus, the period when recruiters can observe high school players runs through the fall and winter seasons. The period when recruiters can contact players off-campus is during the winter season.

Plaintiffs also argue that Michigan girls face some recruiting restrictions because of the fall basketball season. In 2001-02, for Division I schools, the NCAA has set "quiet periods" when in-person recruiting contacts are limited to campus visits, for August 1-September 8 and September 30-October 7. (Tr. Exh. 5 at 3-4 (Excerpts from 1999-00 NCAA Recruiting Manual, pages 88-89); Tr. Exh. 7 at 9 (2001-02

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[15] The NCAA limits Division I colleges to forty evaluation days during the evaluation period and sixteen contact days during the contact period. Those days not designated by the college as an evaluation day or contact day are treated as quiet period days. (Tr. Exh. 7 at 9.)

NCAA Guide for the College-Bound Student-Athlete).) The NCAA has also set a "dead period," when no contacts are permitted, for November 12-15. *Id.* In 2001-02, practice and the regular season for Michigan girls began during the first quiet period. (Tr. Exh. 9(a) at 113.) During these quiet periods, Michigan girls are playing high school games, presumably making on-campus visits more difficult.

B. Girls' Volleyball

The Court finds that the MHSAA's scheduling of girls' volleyball in the winter, not a traditional season for girls' volleyball, disadvantages girls in several remarkable ways described in this section. Other scheduling decisions have forced girls' volleyball into a non-traditional season, unlike the other sports with only boys' teams. In volleyball, the non-traditional season is the disadvantageous season for girls.

In 1999-2000, 20,934 girls played volleyball for MHSAA member schools, the largest number of participants in a MHSAA girls' sport. (Tr. Exh. 99 at 42-43 (1999-2000 Athletics Participation Survey).)[16] The MHSAA schedules the volleyball state championship tournament in the winter. (Stip. Fact No. 42.) For 2001-02, the MHSAA set the first practice date as November 15, the first contest date as December 8, and the end of the season as March 16. (Tr. Exh. 9(a) at 113 (2001-02 MHSAA Quick Reference Calendar).) This means that Michigan high school girls' volleyball is played in the winter season.

The traditional playing season for women's volleyball is the fall. (Tr. at 497:21-498:1, Donna Lopiano.) Forty-eight states play high school girls' volleyball in the fall. (Tr. Exh. 256 (National Federal Sport Season Surveys)).[17] The

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[16] The 1999-2000 participation data is found at the last two pages of Trial Exhibit 99.

[17] As a result of litigation, three states will soon be switching their girls' volleyball to fall and girls' basketball to winter, and one state is

NCAA schedules women's volleyball in the fall. (Tr. at 246:8-9, Bette Norman-Nakamura[18] Testimony.) Although the MHSAA does not currently sponsor boys' volleyball, the MHSAA's executive staff and volleyball committee have recommended that once the sport is adopted, it be played in the spring when the NCAA schedules men's volleyball. (Tr. Exh. 79 at 2 (Excerpts from Spring 1997 MHSAA Representative Council Meeting Agenda).)

College volleyball recruiting focuses on the amateur, private club programs, like those sponsored by an organization called the United States Volleyball Association (USAV),[19] rather than the high school programs because of recruiters' ability to see a far larger number of players in a single setting than at a high school contest or tournament. (Tr. at 326:20- 327:6, Charles Erbe[20] Testimony) (testifying that a recruiter can only see twenty-four players at a high school match or 100 players at a high school tournament compared to as many as 5,000 players at a USA Volleyball

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voluntarily doing so, bringing the total to forty-eight states who schedule those girls' sports that way.

[18] Ms. Norman-Nakamura, who testified on behalf of Plaintiffs, is a teacher with Warren Consolidated Schools in the Detroit area, and a past president of the Michigan Interscholastic Volleyball Coaches Association. (Tr. at 200:17-21, 226:5-21, B. Norman-Nakamura.) She has been coaching volleyball at various levels and in various programs since the 1960s. (*Id.* at 202:3-15.)

[19] This was the acronym used by witnesses to refer to this organization.

[20] Mr. Erbe is head women's volleyball coach at Michigan State University and testified on behalf of Plaintiffs. (Tr. at 321:22-23, C. Erbe.) He began his coaching career working with girls' high school programs in California. (*Id.* at 323:4-13.) He founded the United States Junior National Volleyball Program, which provided most of the players to the 1980 and 1984 USA Olympic women's volleyball teams. (*Id.* at 323:24-324:17). He also coached the University of Southern California's women's volleyball team to four national championships. (*Id.* at 324:19-325:10). His teams at Michigan State have perennially finished near the top of the Big 10 Conference standings and participated in the NCAA tournament. (*Id.* at 325:21-326:6.)

tournament held over a two to three-day period). The recruiting that occurs in Michigan during the high school girls' volleyball season is mostly limited to smaller in-state schools. (Tr. at 330:8-21, C. Erbe; Tr. at 383:7-16, K. Eveland; Tr. at 427:5-12, Sharon Schatz[21] Testimony.)

The USAV and AAU, another private club program, seasons for high school age players to play in their amateur programs are from January through June or July. (Tr. at 206:3-207:5, B. Norman-Nakamura.) MHSAA rules prohibit athletes from participating in USAV or AAU club volleyball during their December through March high school season. (*Id.* at 221:21-24; Tr. Exh. 9.)

The most competitive club volleyball programs are sponsored by USAV, the sport's national governing body. (Tr. at 327:3-7, C. Erbe; Tr. at 382:15- 383:3, Kele Eveland; Tr. at 1066:7-10, Phil Wilson[22] Testimony.) Outside of Michigan, the USAV club season for high school age girls begins in early January and continues through early July. (Tr. at 206:8-14, B. Norman-Nakamura.)

Michigan girls who participate in high school volleyball are not able to participate in USAV club volleyball until April, after the MHSAA season has ended, while players in other states have been playing club volleyball since January. (Tr. at 328:1-22, C. Erbe.) The MHSAA prohibits students from playing on any team other than a school team during the MHSAA-defined season in that sport. (Tr. Exh. 9(a) at

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[21] Ms. Schatz is president of the Michigan Junior Volleyball Association and coached women's volleyball at Aquinas College, a National Association of Intercollegiate Athletics (NAIA) school, for 15 years. (Tr. at 411:8-13, S. Schatz). She testified on behalf of Plaintiffs.

[22] Mr. Wilson, a teacher at Kalamazoo Valley Community College and the head volleyball coach at Kalamazoo Central High School, testified on Defendant MHSAA's behalf. (Tr. at 1045:11-17, P. Wilson.) He has coached volleyball at Kalamazoo Central for ten years, and his team won the Class "A" state championship in 1996. (*Id.* at 1047:8-13.)

43 (Regulation I, § 13); Tr. at 453:10-19, Jack Magelssen Testimony.)[23]

By the end of the MHSAA season, most of the regional and national USAV tournaments have been filled by non-Michigan teams. When there are openings, Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing, they don't have a power rating, [and] they don't have the ranking that other teams do when they do the [seeding]." (Tr. at 328:4-12, C. Erbe; Tr. at 441:7-15, J. Magelssen.)

Michigan club teams have difficulty excelling at these tournaments because they are becoming accustomed to playing with new teammates and a new coach while their competitors have already been playing together for four months. (Tr. at 446:4-14, J. Maglessen.)[24] It is therefore more difficult for recruiters to evaluate Michigan players at these tournaments. (*Id.* at 446:15-19.)

Playing high school volleyball in the winter rather than the fall affects Michigan girls' ability to be recruited in two ways. First, they are not seen by college coaches who go to the USAV club tournaments to recruit. (Tr. at 328:23-329:3, C. Erbe; Tr. at 386:3-22, K. Eveland.) Second, they miss out on "the experience of competing against a broad base of competition." (*Id.* at 329:3-14, C. Erbe.) This experience is

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[23] Mr. Magelssen is a teacher and head volleyball coach at Portage Northern High School, where his teams have won ten state championships. (Tr. at 435:6-9, 436:2-9, J. Magelssen.) Mr. Magelssen has been named MHSAA Class A coach of the year ten times, was a finalist for national coach of the year in 1987, and was national coach of the year in 1994. (*Id.* at 439:13-20, 440:2-9.) He has also coached USAV and AAU club volleyball since 1984. (*Id.* at 437:23-438:18.) He testified on behalf of Plaintiffs.

[24] When the Michigan club teams are formed they are essentially new teams because MHSAA rules prohibit more than three players from a single school team from playing for their school coach "outside of the MHSAA-defined season for [that] sport." Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)1.e.).

instrumental in forging a player's psychological framework and confidence that she can "compete against anybody at any level." (*Id.*)

Because of the shortened club season for Michigan girls, over a four-year high school career, they will have 16 months less of competitive training and experience compared to girls in the 48 states that play high school volleyball in the fall. (Tr. at 330:22-331:8, C. Erbe.) This shortened experience disadvantages Michigan girls because recruiters are looking for players "with the most experience." (*Id.* at 331:9-19, 441:5-7, J. Magelssen.) This limited experience affects even those girls who are eventually successfully recruited to play in college volleyball programs. (Tr. at 342:1-7, C. Erbe (observing that his Michigan recruits come into college "less confident," "scared," and "afraid to make mistakes" compared to his out-of-state recruits).)

For example, Kele Eveland,[25] an All-State volleyball player as a junior and senior, received only one handwritten letter[26] from smaller Division II schools during the MHSAA volleyball season. (Tr. at 387:18-23, K. Eveland.) Similarly, Breanna Eveland, a first-team All-State volleyball player as a sophomore and junior, has thus far received only one scholarship offer from a small Division I college and was not currently being recruited by any other schools at the time of trial.[27] (Tr. at 635:2-637:7, B. Eveland.)

In addition, the limits placed on the experience gained by Michigan high school female volleyball players as a result

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[25] In addition to her on-the-court success, Ms. Eveland graduated from high school with a 4.0 grade point average and was valedictorian. (Tr. at 378:8-10, Kele Eveland.) At Georgia Tech, Ms. Eveland made the dean's list both semesters of her freshman year. (*Id.* at 37:12-16.)

[26] A handwritten letter is a personalized letter to the recruit and indicates a higher level of interest from the college than a typewritten form letter. (Tr. at 388:4-10, K. Eveland.)

[27] In addition to playing numerous varsity sports, Breanna Eveland has maintained a 3.4 grade point average. (Tr. at 636:4-5, B. Eveland.)

of playing school volleyball in the winter are increasing. "[E]xperience is becoming an overwhelming factor in the recruiting process, and there just aren't Michigan girls that are at that level." (Tr. at 333:15-20, C. Erbe.) Michigan State's women's volleyball team has no recruited Michigan players as freshmen. Nor will Michigan State have any Michigan players among the incoming freshman recruits in 2002-03. (*Id.* at 333:12-14.)

The MHSAA high school season also disadvantages Michigan girls seeking college athletic scholarships because it occurs after the NCAA's early signing date. Under NCAA rules, high school athletes can first commit to a college program during the second week of November. While there is a subsequent signing date in the spring, the majority of players sign on the first date. (Tr. at 331:20-332:5, C. Erbe.) As a result, a Michigan player is placed at a "severe disadvantage to her counterparts around the nation who are playing high school volleyball in the fall," and whose season is completed or nearly complete by the first signing date. (*Id.* at 332:14-18.) As Mr. Erbe testified:

> [L]et's say I have one scholarship left and I'm looking at a young lady from Illinois and I'm looking at a young lady from Michigan. Because the high school season is in the fall in Illinois, I can go watch that young lady compete to get a final evaluation before I make a decision. I cannot watch the Michigan player because her high school season does not start until after the signing date.

(*Id.* at 332:6-14.)

These recruiting disadvantages affect not only Michigan's elite volleyball players but also Michigan girls with a broad range of ability who could be recruited by smaller Division I programs, Division II and Division III programs, and NAIA programs. (Tr. at 329:19-330:7, 332:19-23, C. Erbe.) These disadvantages not only cost girls opportunities to participate in college athletics but further

harm those girls who, without athletic scholarships or related financial assistance, would be unable to afford to attend college or to attend the college of their choosing. (*See* Tr. at 380:6-16, K. Eveland; Tr. at 562:8-15, Breanne Hall Testimony.) The average Michigan high school volleyball player is two to three years behind players in other states. (Tr. at 369:3-6, C. Erbe.)

Michigan girls cannot be named to All-American teams and their teams cannot participate in national rankings and polls. (Tr. at 444:9-445:1, 447:5-12, J. Magelssen.) This lack of recognition further hinders girls' ability to be recruited nationally. (*See* Tr. at 501:25-502:2, D. Lopiano.)

In addition to reducing college athletic opportunities, Michigan girls' inability to participate in club volleyball programs is itself harmful. Girls miss opportunities to further develop technical skills, as well as the opportunity simply to play. Over the course of a high school career, girls will play sixteen months fewer of volleyball than they otherwise could if volleyball were scheduled in the fall because of the conflict between the club and high school playing seasons. (Tr. at 330:22-331:8, 331:9-19, C. Erbe; Tr. at 441:5-7, J. Magelssen.)

Club volleyball benefits not only the elite player but the "grass roots" player who wants to develop her skills in order to make her high school team. (Tr. at 414:8-12, 429:1-5, S. Schatz ("the players in Michigan are at a disadvantage, whether they are elite or whether they are the kid just trying to make the "A" team in high school because they have restricted amount of time that they can practice out of season, [and] attend clinics").)

In addition, this limits opportunities for girls who live at or near Michigan's borders to participate in volleyball clubs that are close in distance to them. Lynn Kostreva, a teacher and head volleyball coach at Menominee High School, testified that her daughters have been invited to compete on club volleyball teams in Wisconsin but are unable to do so because the Wisconsin club season conflicts with the

MHSAA season. (Tr. at 160:1-5, 178:11-23, L. Kostreva.) Menominee is in Michigan's Upper Peninsula, which borders Wisconsin.

Michigan girls are not able to attend college volleyball matches as a team with their coach because MHSAA prohibits such a gathering from occurring out-of-season. (Tr. Exh. 9(a) at 55 (Regulation II, § 11(G)1.e.); *see* Tr. at 180:14-181:8, L. Kostreva (testifying that, because the collegiate season and clinics occur outside of the MHSAA season, she cannot organize and accompany her volleyball team to these events).) Again, such experiences provide "inspirational and aspirational images" to girls. (Tr. at 502:3-10, D. Lopiano.)

As a result of the MHSAA winter season for high school play, Michigan club teams must travel to tournaments as far away as California, Texas and Colorado rather than playing in tournaments in neighboring states, like Indiana, because these later tournaments occur during the MHSAA season or immediately thereafter. (Tr. at 451:18-452:9, J. Magelssen.) Travel greatly increases the cost to play club volleyball, thereby limiting the number of players who can afford to play. (*Id.* at 452:22-453:3 (testifying that playing in annual Indianapolis tournament would cut club expenses by 50 percent).)[28] This kind of travel would also have an effect on academics and other activities of students involved and could make participating in club opportunities impossible.

High school volleyball teams located near Michigan's bordering states are not able to compete against teams in those states. (Tr. at 170:5-10, 175:12-22, L. Kostreva.) For example, Menominee High School is located within 50 miles of numerous Wisconsin high schools that would require shorter travel time for contests. (*Id.* at 175:3-11.) Because of the MHSAA season, however, Menominee is limited to

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[28] To pay for club expenses, players, in addition to parental assistance, seek sponsors, work part-time jobs, and hold fund-raisers. (Tr. at 380:22-381:6, K. Eveland; Tr. at 453:4-8, J. Magelssen.)

competing against Michigan schools. Contests at schools in Menominee's conference require an average travel time of 90 minutes each way, with the longest trip lasting three hours each way. (*Id.* at 171:25-172:8.) Contests at non-conference schools require even longer travel. (*Id.* at 172:9-15.) In order to arrive on time for an away contest at a non-conference school, Menominee's volleyball team leaves in the middle of the school day and does not return until approximately midnight. (*Id.* at 172:16-173:8.) Because Menominee plays most of its games on Monday and Thursday nights, most of this travel occurs during school days and school nights. (*Id.* at 173:9-13.) In addition, winter weather concerns for travel in the Upper Peninsula, or for locations in Michigan located near any state border, make shorter distances favorable for sports played in the winter season.

Menominee's boys' sports teams, however, are able to play teams from other states. (Tr. at 175:12-22, L. Kostreva (stating that Menominee boys compete against Wisconsin schools in basketball, football and wrestling).) Thus, Menominee's boys can travel as little as five minutes to play a game. (*Id.* at 198:7-14.)

Michigan volleyball players also have difficulty in obtaining specialized volleyball equipment, particularly shoes, because inventories have been depleted by college and high school teams throughout the country before the MHSAA volleyball season begins. (Tr. at 35:7-37:11, D. Madsen; Tr. at 97:5- 17, Kristi Madsen Testimony; Tr. at 114:6-17, Kelsey Madsen Testimony.)

The MHSAA's volleyball witness, Mr. Wilson, testified that girls benefit from playing both basketball and volleyball because the skills possessed by most volleyball players—jumping ability and lateral quickness— are valuable in both sports. (Tr. at 1050:11-18, P. Wilson.) There was no evidence, however, showing that girls who play both sports would be denied these skill-related benefits if MHSAA switched the volleyball and basketball seasons. Also, if the

girls' volleyball and basketball seasons were switched, volleyball players who desired to play on the basketball team, too, would still have the choice to do so and not participate in club volleyball. The MHSAA also presented no evidence to indicate why facilities problems would prohibit rescheduling of girls' volleyball from the winter to the fall, particularly if it were to be switched with girls' basketball.[29]

The MHSAA is correct that Michigan girls and their high school coaches have had success in volleyball in which the entire state can take pride. (*See, e.g.*, Tr. Exh. 275; Tr. at 456:5-457:11, J. Magelssen (discussing the great success of 1994 Kalamazoo Dead Frogs in USA Volleyball).) However, the MHSAA failed to prove whether this indicates that the winter, non-traditional volleyball season is not a disadvantage, or whether this merely indicates that the season is a disadvantage that Michigan girls have worked to overcome. The testimony offered by Plaintiffs convinced this Court that the latter is the correct conclusion.

C. Girls' Soccer

After hearing the evidence, the Court finds that the spring season is the inferior season, as compared to fall, for playing soccer in Michigan. Besides the evidence presented on this point, which was more than sufficient standing alone, the fact that the MHSAA originally scheduled both teams to play in fall, for reasons including the financial advantage to

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[29] Defendant MHSAA also asserted that the winter volleyball season provides Michigan girls with the ability to play two to three times the number of matches than those competing in states with a fall volleyball season. However, the MHSAA could only provide inadmissible hearsay testimony to support this assertion, which the Court may not consider. (Tr. at 1051:10-12, 1064:3-19, P. Wilson.) In addition, unless Mr. Wilson counts tournament matches or some other special circumstances, this assertion does not make logical sense, assuming that the fall and winter seasons are approximately the same length. Certainly the winter season is not two to three times as long as fall, although sometimes it may feel that way in Michigan.

conducting both programs at the same time, is additional circumstantial evidence that fall is a superior soccer-playing season in Michigan. Some anecdotal evidence was presented that logistical problems would occur if both sexes played soccer in the fall or in one season generally, but that evidence was insufficient for the Court to make a finding that logistical problems, if they exist, are insurmountable now or ever.

In 1999-2000, 11,921 girls played soccer for MHSAA member schools. (Tr. Exh. 99 at 42-43.) MHSAA schedules the girls' soccer state championship tournament in the spring. (Stip. Fact No. 21.) For 2001-02, MHSAA set the first practice date as March 11, the first contest date as March 22, and the end of the season as June 15. (Tr. Exh. 9(a) at 113.) This places Michigan girls' soccer in the spring season.

The NCAA schedules women's soccer in the fall. (*See* Trial Exhibit 40 at 2.) There does not appear to be one clear season in which high school girls play in soccer across the nation, but a number of states employ a number of different scheduling mechanisms for soccer.[30]

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[30] According to the Court's review of Trial Exhibit 256, twenty-seven states schedule girls' high school soccer in the fall. (Tr. Exh. 256.) Twenty-two states schedule high school soccer in the spring. (*Id.*) Three southern states, Texas, Louisiana, and Mississippi sponsor girls' and boys' soccer in the winter. (*Id.*) These numbers do not add up to fifty-one (counting the District of Columbia), though, because thirty-six states schedule both sexes to play soccer in the same season, which varies between a single fall or single spring season. (*Id.*) Trial Exhibit 256 does not indicate whether those states sponsoring both sexes in the same season have separate-sex teams or if they sponsor co-ed soccer. (*Id.*) The Court also has no indication of how many schools in Michigan may sponsor co-ed soccer teams.

In addition, states using different seasons for male and female soccer sometimes scheduled boys in spring and girls in fall. A couple of states also sponsored multiple seasons, either both fall and spring or all three seasons, for both girls and boys. (*Id.*) This might mean that there is some arrangement where boys' and girls' junior varsity plays together in one season, and the varsity teams of both sexes play in another. Two states

The MHSAA schedules the boys' soccer state championship tournament in the fall, at the same time that the NCAA schedules men's soccer. (Stip. Fact No. 21; Tr. Exh. 40 at 2.) In 2001-02 boys' soccer, the first practice date was August 13, the first contest date was August 24, and the end of the season was November 10. This places Michigan boys' soccer in the fall season. Plaintiffs' expert Ms. Lopiano testified that the traditional playing season for soccer is the fall. (Tr. at 497:8-10.)

The MHSAA's scheduling of girls' soccer in the spring in Michigan disadvantages girls in several ways. Soccer fields in Michigan are often still frozen or snow-covered when the girls' season starts in the spring, so girls are forced inside for practice and tryouts. (Tr. at 598:17-601:17, D. Adrianse; Tr. at 622:14-623:1, Angie Adrianse[31] Testimony; Tr. at 1163:13-1164:2, T. Miller.) Thus, the regular season starts later than scheduled. (*Id.* at 602:7-12, Daniel Adrianse[32] Testimony.) As a result, Michigan girls must play three games a week over the course of the season to make up postponed games whereas Michigan boys play two games per week over the course of their season. (*Id.* at 601:22-602:15.)

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do not sponsor soccer at all, and one state did not report seasons for girls' sports. (*Id.*)

[31] Angie Adrianse currently attends Michigan State University and graduated from Caledonia High School in 2000. (Tr. at 621:11-18, A. Adrianse.) She testified on behalf of Plaintiffs. During high school, she participated in basketball, volleyball, soccer and cross-country, including playing four years of varsity soccer. (*Id.* at 622:1-8.) She received numerous soccer honors, including All Conference, All District and All Region her junior year. (*Id.* at 622:10-13.) She now plays club soccer for MSU. (*Id.* at 621:24-25.)

[32] Daniel Adrianse is the father of two daughters who played high school sports while attending high school. (Tr. at 593:6-8, 19-24. D. Adrianse.) He is also a member of Communities for Equity and testified on behalf of Plaintiffs. (*Id.* at 9-10.) His younger daughter, Angie Adrianse, also testified on behalf of Plaintiffs.

The increased number of games per week causes a greater risk of injury for girls that Michigan boys do not face. (Tr. at 602:18-603:17, D. Adrianse) (testifying that his daughter Angie's teams and teams she competed against suffered "a lot of injuries" as a result of playing three days a week); Tr. at 623:2-6, A. Adrianse (testifying that playing three days a week is "really hard on your body" and "practices can't even be much because you're exhausted").

Girls playing soccer in spring have some post-season tournament dates that occur after the end of the school year, so because there is no ability for contemporaneous in-school promotion of these games, it is less likely that there will be as much student or other fan support as there is for boys' soccer games. (Tr. at 604:11-607:3, D. Adrianse; Tr. at 623:15-624:25, A. Adrianse.)

Girls' opportunities for collegiate recruitment are decreased because college scholarships for soccer are awarded in November and April. (Tr. Exh. 5 at 19-20.) Recruiters will not have had an opportunity to see female soccer players in Michigan in their senior year of high school before awarding first-round November scholarships because girls start their competitive season in late March. (Tr. at 504:6-14, D. Lopiano.) Michigan boys play during the fall season and are able to have four years of high school competition for college recruiters to consider.

The MHSAA's soccer witness was Thomas Miller, a retired teacher who coaches boys' and girls' soccer at Midland Dow High School and former president of the Michigan High School Soccer Coaches Association. (Tr. at 1135:9-19, 1137:3-6, Thomas Miller Testimony.) Asked by MHSAA whether the fall or the spring is advantageous for recruiting, Mr. Miller responded only that "most of the top level players are recruited before their senior year."[33] (*Id.*

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[33] Of course, that conclusion begs the question. If girls are playing in the spring, it is obvious that recruiting would be forced to take place before the senior year for female players. That does not answer whether

at 1153:10-15.) Nor was Mr. Miller able to identify when the NCAA letter of intent signing date is for soccer. (*Id.* at 1164:7-9.)

The United States Soccer Federation (USSF) and the American Youth Soccer Organization (AYSO) club soccer seasons for high school age players take place in the spring. The Olympic Development Program (ODP) for soccer takes place during spring and summer for high school age soccer players. Because MHSAA rules prohibit athletes from playing high school sports and club sports during the same season, girls but not boys lose opportunities to participate in USSF, AYSO, and ODP programs. (Tr. at 626:11-629:8, A. Adrianse; Tr. at 504:15-24, D. Lopiano; Tr. at 1168:2-16, T. Miller.) There is some private club soccer in the fall for girls, so in the event that Michigan girls played high school soccer in the fall, girls would have to choose between those programs. (Tr. at 630:18-631:10, A. Adrianse.)

Again, Michigan girls cannot play against schools in the bordering states of Ohio and Indiana because these states conduct girls' soccer in the fall, whereas Michigan boys could compete in both states. (Tr. Exh. 256 at 15, 36.) But two of Michigan's border states, Illinois and Wisconsin, schedule soccer in separate seasons as Michigan does, with their girls and boys playing in the same seasons as Michigan. (Tr. at 1170:13-1171:7, T. Miller; Tr. Exh. 256 at 14, 23, 50.)

Plaintiffs' witness testified that Michigan girls cannot participate in national rankings or All-American individual rankings because their interscholastic season takes place after the fall traditional season. (Tr. at 504:2-5, D. Lopiano.)

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this is a detriment particular to playing in a spring soccer season, or if recruiting would still take place prior to the senior year even if girls played in fall. It also does not provide any information with respect to players who are not "top level" but who, if they were provided with equal opportunities in high school programs, might still be able to obtain non-scholarship spots on collegiate teams, scholarships in less prestigious collegiate soccer programs, or partial scholarships at better collegiate soccer programs.

Of course, reduced visibility would negatively affect ability to be recruited and produces the general disadvantage of less recognition. (*Id.*) Mr. Miller indicated that Michigan girls still have the opportunity to be nationally ranked, but did not indicate the extent to which they have been ranked or if that opportunity is at all impacted by the spring season. (Tr. at 1150:19-1152:19.) The Court therefore does not know whether the ranking takes place during the fall, and thus it is more difficult for girls to be ranked because they are relying on their distant spring season performance, or if there are special spring rankings for high school girls' teams.

There are a few advantages to playing in the spring that girls currently reap. Girls' soccer games are frequently scheduled on Friday nights in the spring season; boys' soccer games are not or are infrequently scheduled on Friday nights in the fall because of the conflict with boys' football games. (Tr. at 1148:19-1149:7, T. Miller; *see also* Tr. at 144:13-147:3, C. Engel.)

In addition, it is more difficult to obtain and provide experienced high school soccer officials during the fall season because colleges also compete in the fall. (Tr. at 1144:13-21, T. Miller.) High schools obtain better officials in the spring during the girls' season. (*Id.* at 1144:22-23.) Even though it appears that sufficient numbers of people are registered to officiate soccer, registration of soccer officials with the MHSAA does not suggest that officials are either available to work, competent or experienced. (Tr. at 1158:1-4, 1172:13-17, T. Miller.)

Mr. Miller's concerns about changing seasons, however, were all in terms of potential logistical problems that would occur if the seasons were combined, and not if boys' and girls' seasons switched with each other. Approximately one-third of Michigan high school soccer coaches coach both boys' and girls' soccer at their respective schools. (Tr. at 1140:14-19, T. Miller.) It would be difficult to coach both teams during the same season, so some existing coaches

would lose one of their coaching positions, and new coaches would have to be hired. (*Id.* at 1141:8-13, 1156:23-1157:1.) The quality of the surfaces of soccer fields will also decline with twice as many players on them. (Tr. at 1147:22-1148:4, T. Miller.)

Mr. Miller testified that he believes that if boys and girls play soccer in the same season, participation opportunities will decline because schools will have to cut team offerings as a result of logistical problems like finding sufficient officials, coaches, and fields. (Tr. at 1153:24-1154:8, T. Miller.) However, because of the lack of more specific evidence on these points, the Court is not convinced that either alternatives to these problems could absolutely not be found or that these problems would not be able to be resolved after a period of adjustment.

D. Lower Peninsula Girls' Golf

The Court finds that in Michigan, fall is the more advantageous season for playing high school golf. Again, there was plenty of direct evidence to support this finding, but the fact that the boys' golf program, which was in existence first, was moved from spring to fall also lends circumstantial evidence to the Court's conclusion. Moreover, there was no evidence that logistical difficulties would pose a problem in scheduling boys' and girls' golf at the same time.

In 1999-2000, 3,564 girls played golf for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the Lower Peninsula girls' golf state championship tournament in the spring, at the same time that the NCAA schedules women's golf. (Stip. Fact No. 38; Tr. Exh. 40 at 2.) The MHSAA schedules the golf state championship tournament in the spring for Upper Peninsula boys and girls. (Stip Fact No. 39.) For 2001-02, MHSAA set the first practice date for Lower Peninsula girls' golf as March 11, the first contest date as March 14, and the end of the season as June 1. (Tr. Exh. 9(a) at 113.) This places Lower Peninsula girls' golf in the spring season.

The MHSAA schedules the Lower Peninsula boys' golf state championship tournament in the fall, while the NCAA schedules men's golf in the spring. (Stip Fact No. 37; Tr. Exh. 40 at 2.) For 2001-02, MHSAA set the first practice date for Lower Peninsula boys' golf as August 9, the first contest date as August 13, and the end of the season as October 20. (Tr. Exh. 9(a) at 113.) This places the Lower Peninsula boys' golf season in the fall.

Lower Peninsula boys' golf used to be in the spring, but the MHSAA moved it to the fall season in the 1970s so that boys' golf teams would have better access to golf courses. (Tr. Exh. 10(a) at 6.) The MHSAA scheduled Lower Peninsula girls' golf in the spring, which was the season it had previously determined was less advantageous when it moved boys' golf. (Tr. Exh. 10(a) at 29.)

The traditional playing season for golf is the spring. (Tr. at 497:14-16, D. Lopiano.) But Breanne Hall, who played high school golf for East Kentwood High School and now plays college golf for University of Toledo, testified that fall is the better season for golf in Michigan for a number of reasons.[34] (Tr. at 565:6-569:4.)

In Michigan, it is easier to obtain tee times in the fall rather than the spring, and it is easier to obtain "the use of better courses." (Tr. at 567:8- 14, B. Hall; Tr. Exh. 29 at 2 (1973-74 MHSAA Bulletin, vol. L, p. 6).) It is easier to obtain tee times in fall because "[a] lot of people have had all summer to play. By the time when the fall rolls around, a lot of people have put their clubs away. And when the weather starts to get nice [in the spring], everyone [in the general public] is ready to get out there and start playing." (Tr. at 567:11-14, B. Hall.) Thus, girls' teams must compete more with members of the general public for tee times than they would in fall.

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[34] Ms. Hall has earned academic honors as well. She graduated with a 3.8 grade point average from high school and has earned a 3.7 grade point average thus far in college. (*Id.* at 562:2-7, 563:10-12.)

In Michigan, the golf courses are in better condition during the fall season. (*Id.* at 565:12-18.) Girls are more likely to face cold, icy weather and frozen or muddy golf course greens in the spring and do not have the advantage of starting the season on a course which has been groomed all summer. (*Id.* at 565:12-21; Tr. at 511:5-15, D. Lopiano.) Michigan boys in the Lower Peninsula enjoy these course conditions and availability while Michigan girls do not.

In addition, because the NCAA letter of intent signing date is in early November, Michigan boys have four years of golf experience and scores on which to be evaluated. (Tr. at 564:19-565:1, B. Hall.) Michigan girls only have three years because their season occurs after the letter of intent signing date. (*Id.*)

For example, Ms. Hall, an All-State golfer as a junior and senior, was ranked among the top eight female high school golfers in the state and finished third in the state championship tournament. (Tr. at 561:13-17.) Notwithstanding her outstanding senior season, Ms. Hall only received a 50 percent scholarship to Northern Kentucky University, a Division II college, to play golf. (*Id.* at 558:24-559:7, 561:13-17.) After having a successful freshman year at Northern Kentucky and competing in a tournament against Division I teams, Ms. Hall received a 75 percent scholarship to play golf at the University of Toledo, a Division I college, where she currently attends. (*Id.* at 558:17-19, 559:8-13, 559:24-560:4.)

Moreover, Michigan boys go straight from summer play to their high school fall season, allowing them to maintain their peak condition and low scores. (Tr. at 565:24-566:8, B. Hall.) Weather conditions do not allow golf courses to stay open during the winter months. (*Id.* at 565:19-21, B. Hall.) As a result, Michigan girls begin their spring high school season without the benefit of playing during the winter and score more poorly. (*Id.* at 565:22-566:8.) This affects the recruiting opportunities for Michigan girls because

"obviously the coaches want the players with the lower [better] scores." (*Id.* at 566:14-18.)

The MHSAA pointed out that the spring season has the advantage of being the time when daylight hours are longer, so it is easier to play eighteen holes of golf without missing school than it is in the fall. (Tr. at 571:11-17, B. Hall.) However, this advantage hardly makes up for the other disadvantages of the spring golfing season.

No significant evidence was introduced to assert that logistics would make maintaining both the girls' team and the boys' team in the same Lower Peninsula golf season difficult or impossible. In addition, Plaintiffs' expert opined that boys and girls golfing together would gain psycho-social benefits from co-ed training and could play mixed tournaments or matches. (Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

E. Lower Peninsula Girls' Swimming and Diving

The Court finds that the winter season for swimming has advantages that outweigh advantages to swimming in fall. The parties presented reasons why they each believe that the fall or winter swimming season is more advantageous than the other season.

All other testimony presented objected to moving the girls' season because of concerns that both sexes in one season would create logistical problems. The Court finds that the opposition to moving girls' swimming to the same season as boys' swimming is mostly motivated by a desire to keep them in separate seasons for administrative convenience in utilizing facilities and coaches, and not particularly because there is a belief that the girls' swimming season is superior or equal to the boys' season. The Court also finds that the anecdotal evidence presented of potential logistical problems was insufficient to prove logistical problems would occur if both sexes swam in the same season. If logistical problems would exist, there was also insufficient evidence that those problems would not have solutions.

In 1999-2000, 6,652 girls participated in swimming and diving for MHSAA member schools. (Tr. Exh. 99 at 42-43.) The MHSAA schedules the Lower Peninsula girls' swimming and diving state championship tournament in the fall. (Stip. Fact No. 46.) For 2001-02, the MHSAA set the first practice date for Lower Peninsula girls as August 13, the first contest date as August 25, and the end of the season as November 17. (Tr. Exh. 9(a) at 113.) The setting of these dates puts the Lower Peninsula girls' swimming and diving season in the fall.[35] The MHSAA schedules the swimming and diving state championship tournaments in the winter for Upper Peninsula boys and girls. (Stip. Fact No. 47.) The entire season for both boys and girls in the Upper Peninsula is placed by the MHSAA in the winter because of the starting and ending dates.

MHSAA schedules the Lower Peninsula boys' swimming and diving state championship tournament in the winter. (Stip. Fact No. 45.) For 2001-02, MHSAA set the first practice date for Lower Peninsula boys as November 19, the first contest date as December 1, and the end of the season as March 9. (Tr. Exh. 9(a) at 113.) This places the Lower Peninsula boys' swimming and diving season in the winter.

The MHSAA rescheduled the girls' swimming season from fall to winter, as Plaintiffs request here, in 1990 because "[t]here had been ten years of effort to expand girls' opportunities in the winter or at least equalize girls' opportunities in the fall, winter, and spring seasons. The Council had statistical information from the Department of Education showing unequal opportunities for girls in the winter compared to boys and compared to girls'

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35 There was some indication that the NCAA schedules men's and women's swimming in the winter. (Tr. Exh. 40 at 2.) Ms. Lopiano also testified that the traditional season for swimming and diving is the winter. (Tr. at 497:17-20.) But Mr. Phill testified that college men's and women's teams swim from September and continue through the end of March. (Tr. at 1192:19-23.)

opportunities in the fall and spring seasons." (Tr. Exh. 44.) In response to this change of seasons, the Michigan Interscholastic Swim Coaches Association (MISCA) hired an attorney to advocate its opposition to this move to the MHSAA's Representative Council. (Tr. at 1196:2-24, Greg Phill Testimony.[36]) Mr. Phill testified that MISCA hired the attorney to express the group's displeasure because "[the coaches] did not want the boys and girls together [in the same season] and we felt that that would be detrimental to the sport." Fifty of the 250 schools offering swimming also complained, and the MHSAA moved the girls' swimming season back to the fall.[37] (Tr. Exh. 45 at 236.)

Plaintiffs argue that the winter season is more advantageous than fall for swimming. For one reason, Michigan boys are able to go straight from the high school swimming season to the club tournaments, whereas Michigan girls have a gap in competition because their season has ended in November. (Tr. at 505:4- 506:1, D. Lopiano.) Sectional and regional swim meets for U.S. Swimming take place in March.[38] (Tr. at 1202:7-12, G. Phill.)

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[36] Greg Phill, who testified on behalf of Defendant MHSAA, is a swim coach for Livonia Stevenson High School and for Clarenceville Swim Club, a U.S. Swimming program. (Tr. at 1175:23-1176:6, G. Phill.) He coaches the girls' team, has been at Livonia Stevenson for sixteen years, and has been coaching swimming for twenty-five years. (*Id.* at 1176:14-15.) He has also coached and continues to coach an Olympic swimmer, Sheila Taormina, who won a gold medal in 1996 in a relay event. (*Id.* at 1176:16-1177:12.)

[37] After Lower Peninsula girls' swimming was moved back to fall, the MHSAA sponsored a competitive cheerleading tournament for girls in the winter to add an athletic opportunity. (Tr. Exh. 52.)

[38] Mr. Phill testified, upon questioning by one of the MHSAA's attorneys, that in Michigan, the highest level of regular-season competition is found in high school swimming, as opposed to U.S. Swimming club-level swimming. (Tr. at 1192:8-12.) Presumably, this was in response to the fact that girls miss U.S. Swimming club competition because of the season in which they swim. This does not prove that missing U.S. Swimming competitions is not a detriment, however. Even if it is true that high school competition is higher level, girls who seek

The Phillips 66 national swim championships are in March/April of each year. (Tr. at 1202:13- 24, G. Phill; Tr. at 505:4-506:18, D. Lopiano.) In diving, junior nationals are in March, so girls face a gap in competition between the end of their fall interscholastic season and open amateur competition. (Tr. at 506:19-507:4., D. Lopiano.)[39]

Finally, the boys' swimming season is nearly two weeks longer than the girls' season, giving the boys a greater opportunity to practice and compete. (Tr. at 500:25-501:1, D.

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additional swimming opportunities through club participation are denied participation in this particular club program or in these particular competitions.

While girls' amateur participation opportunities are affected by missing amateur competitions, the Court finds that recruiting opportunities are not affected one way or the other. Collegiate recruiting is not dependent on seeing the swimmer, since "[b]asically swimming is a black and white sport. You're either this fast or you are not that fast, and that's what they look at. Most college recruiting is done from [an] office." (Tr. at 1190:18-1191:2, G. Phill.) In addition, girls would be able to rely on their final, senior year season performance to attempt to obtain a scholarship or the opportunity for a non-scholarship spot on a collegiate swim team.

[39] Plaintiffs' expert testified that this is particularly crucial because Michigan boys are able to do a single "taper," whereas Michigan girls must do a double "taper" to compete in the state championship in the fall and the national championships in the winter. (Tr. at 505:4-506:1, D. Lopiano.) A taper is designed to have a swimmer peak in time for a championship event. It involves intense training over a period of time, usually at the season's beginning, followed by a gradual decline in practice workload so that the swimmer can physically recover and can be primed to swim his or her fastest times. (*Id.* at 506:2-18.) It is extremely difficult to do tapers in close proximity to each other because of the time and physical exertion required. (*Id.* at 505:12-16.)

Michigan boys are able to focus on a single taper because the national tournaments are usually the week after the MHSAA state championship tournament. (Tr. at 505:16-506:1, D. Lopiano.) Michigan girls do not have that benefit because their high school season has concluded in late November. Michigan boys who dive are able to go straight from their winter season to the national open amateur tournament in March, whereas girls have a competition gap unless they are able to afford a private diving club and continue their training in preparation for the national tournaments. (*Id.* at 506:19-507:4.)

Lopiano; Tr. Exh. 63 (1998-99 MHSAA Quick Reference Calendar).)[40]

The MHSAA offered testimony on the reasons why the fall season could be considered superior or equal to the winter season for swimming. Mr. Phill said that high school swimming programs in Michigan are flourishing for girls, but declining for boys. (Tr. at 1184:22-1185:17, G. Phill.) He believes that this is because the fall season for girls allows them to transition from summer swimming and clubs to the high school program in the fall, but boys do not have the same incentive to return to winter high school competition after taking the fall season off. (*Id.*) There could well be other reasons for a decline in boys' programs, like the rise of other sports offered for boys in fall, particularly soccer, for example. In addition, Mr. Phill testified that he and other girls' swimming coaches feel that fall is superior to winter for the swimming season because there are not the distractions of the winter season, like exams, the winter break for the holidays, or spring break. (Tr. at 1181:12-17, G. Phill.)

The rest of the MHSAA's evidence about swimming centered on its assertion that participation opportunities for both girls and boys would decrease if both swam in the same season. Approximately one-third or more of Michigan's high school swimming coaches coach both girls' and boys' programs for their respective schools. (Tr. at 1188:22-1189:1, G. Phill.) Mr. Phill testified that coaches could not

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[40] One of Plaintiffs' experts argued that putting Lower Peninsula swimming and diving into the same season would allow teams to share travel, promotion, coaching, and facility rental time. In addition, she argued that they could swim mixed relay events together and have a swimming program even if there are not enough athletes for a single-sex team. There was simply no empirical evidence presented to enable the Court to make a finding on those assertions. However, the Court believes Plaintiffs' expert's assertion that there can be attendant psycho-social benefits when young males and females train and compete together, in certain circumstances. (*See* Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

coach both teams at the same time. (*Id.* at 1189:2-24.) Clearly, this means that some unknown number of new coaches would have to be hired if boys and girls swam in the same season. There was no testimony regarding how difficult or easy hiring these coaches would be.

Joining the seasons would also cause a decline in club programs that rent pool space from schools. (Tr. at 1187:25-1188:4, G. Phill.) Presumably, this would only occur in the combined season, not in the season when no high school teams would be swimming.

Mr. Phill asserted that the dimensions of swimming pools to which he has been in states where boys and girls swim in the same season are often 50 meters by 25 yards. (Tr. at 1183:11-13.) There are no high school pools in Michigan with dimensions of that size. (Tr. at 1183:15-17, G. Phill.) There was no testimony regarding how well Upper Peninsula schools manage, in terms of having sufficient pool space, in offering swimming to both sexes in the winter. Mr. Phill further testified that at Livonia-Stevenson High School, where he coaches, the girls' "B" team would have to be eliminated if the seasons were joined.[41] (Tr. at 1186:13-20.)

F. Girls' Tennis

After reviewing the evidence, the Court finds that spring is the more advantageous playing season for tennis. In addition, the MHSAA presented no evidence that both sexes playing tennis in the same season would create logistical problems.

In 1999-2000, 8,759 girls played tennis for MHSAA member schools. (Tr. Exh. 99 at 42-43.) MHSAA schedules the girls' tennis state championship tournament in the fall. (Stip. Fact No. 36.) For 2001-02, MHSAA set the first practice date as August 13, the first contest date as anytime

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[41] Mr. Phill testified that the Livonia-Stevenson girls' team currently has sixty-four girls, whereas he expects the boys' team to have eighteen in this winter's season. (Tr. at 1183:18-24.)

after the first practice, and the end of the season as October 20. (Tr. Exh. 9(a) at 113.) These decisions place girls' tennis in the fall.

MHSAA schedules the boys' tennis state championship tournament in the spring, at the same time that the NCAA schedules women's and men's tennis. (Stip. Fact No. 35; Tr. Exh. 40 at 2.) For 2001-02, MHSAA set the first practice and contest dates for boys' tennis as March 11 and the end of the season as June 1. (Tr. Exh. 9(a) at 113.) This places the boys' tennis season in the spring. The traditional playing season for tennis is the spring. (Tr. at 497:11-13, D. Lopiano.)

Boys' high school tennis immediately precedes the United States Tennis Association (USTA) summer tennis tournament circuit, so boys have the advantage of high school practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play. (Tr. at 508:4-509:3, D. Lopiano; Tr. at 700:21-701:13, L. Bunker.) In addition, the girls' high school tennis season is approximately 20 days shorter than boys' tennis. (Tr. at 500:20-24, D. Lopiano; Tr. Exh. 63.)[42]

IV. PSYCHOLOGICAL AND GENERALIZED HARMS TO MICHIGAN GIRLS

The current scheduling of seasons harms Michigan girls in a number of ways that can be generalized across all of the sports at issue in this case. First, the practice of scheduling only girls' sports, but not boys' sports, in disadvantageous and/or non-traditional seasons sends the clear message that female athletes are subordinate to their male counterparts,

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[42] Putting girls' and boys' tennis into the same season would allow teams to share travel, promotion, coaching, and facility rental time. They could play mixed doubles matches together and have a tennis program even if there are not enough athletes for a single-sex team. Moreover, there are psycho-social benefits from young males and females training and competing together. (Tr. at 668:12-669:11, 706:20-709:17, L. Bunker.)

and that girls' sports take a backseat to boys' sports in Michigan. (*See* Tr. Exh. 81 at 1.) It also deprives girls of contemporaneous role models, skills development, and team-building opportunities.

These scheduling practices also have a negative effect on the gender role socialization of Michigan's girls.[43] Treating boys and girls differently and inequitably in athletics can contribute to or cause girls and boys to have dramatically different perceptions of self-worth and to cause girls to have lower expectations for themselves. (*Id.* at 676:13-19.)

When girls are treated unequally as compared to boys, girls receive the psychological message that they are "second-class" or that their athletic role is of less value than that of boys. (Tr. at 494:9-556:1, D. Lopiano; Tr. at 673:3-15, 679:11-680:13, L. Bunker.) Being scheduled in a non-traditional season, or in a season that is clearly disadvantageous while boys are scheduled in the clearly advantageous season, gives girls this "second-class" status message. (Tr. at 638:25-639:6, B. Eveland; Tr. at 340:17-344:22, C. Erbe; Tr. at 450:19-451:5, J. Magelssen; Tr. at 137:2-137:11, C. Engel.)

This message stays with girls throughout adulthood and can extend to careers and interpersonal relationships. (Tr. at 673:16-674:12, L. Bunker.) When girls receive separate and unequal treatment, this teaches them to expect discrimination, so that they may not even recognize discrimination when it occurs. (*Id.* at 714:1-715:8.) In addition, girls may be wary of change because they do not know what to expect or fear that the situation could become even worse for them.[44] (*Id.* at 679:11-683:19, 715:9-21; *see also* Tr. Exh. 254.[45])

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[43] Gender role socialization is the psychological term used to explain how an individual learns what is expected of him or her based on his or her sex. (Tr. at 665:24-666:03, L. Bunker.)

[44] Dr. Bunker examined a study conducted by the Office for Sex Equity and Education of the Michigan State Department of Education on

Differential and unequal treatment of boys and girls in the scheduling of seasons can psychologically affect girls in negative ways. (Tr. at 679:11- 680:13, L. Bunker.) If girls recognize that boys always play in the traditional seasons while girls play in the non-traditional seasons, coupled with other unequal treatment such as prime time game scheduling, girls may develop unhealthy coping mechanisms to rationalize away the unfair treatment. (*Id.* at 680:2-13.)

One of these mechanisms might be to establish lower expectations. That is, a girl will recognize she is being discriminated against but expect that this will continue for the rest of her life and assume she must adjust to the

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the perception of boys and girls and their interactions in the school environment. (Tr. at 670:10-20, L. Bunker; Tr. Exh. 105 (4/92 Report: "The Influence of Gender-Role Socialization on Student Perceptions").) While the Court gives this study very little weight in its consideration of the evidence, it is interesting to note that the results of this study done in Michigan tend to confirm the expert opinions of Dr. Bunker.

This study asked Michigan high school boys and girls to imagine their reaction if they woke up the next morning as a member of the opposite sex. (Tr. at 671:4-8, L. Bunker.) Twenty-two percent of the female respondents indicated that they had at some point wanted to change gender. (Tr. Exh. 105 at 3, 11-12; Tr. at 671:8-11, L. Bunker.)

In contrast, only three percent of the male respondents said they had ever considered wanting to be a girl. (Tr. Exh. 105 at 3.) "More than any other item," girls who wanted to change gender believed they would receive better athletic opportunities. (Tr. Exh. 105 at 11-12; Tr. at 671:8-11, L. Bunker.) Boys, on the other hand, perceived that if they were a girl they would receive second-class treatment. (Tr. at 676:17-19, L. Bunker.)

[45] In a survey conducted by Western Michigan University and commissioned by the MHSAA for this lawsuit, girls who were asked to comment on the possibility of changing their sports seasons indicated some concern that if seasons changed or combined with boys' seasons, girls would end up with worse practice or playing times or other disadvantages. For example, one girl said, "... Putting sports like basketball or tennis into the same season for both boys and girls is probably a disadvantage to the girls. This is because many schools will treat the girls teams as if they aren't important. The girls will not get as good practice or coaching in many cases." (Tr. Exh. 254 at 43.)

discrimination rather than seek to change it. (Tr. at 680:17-22, L. Bunker.)

For example, Kristi Madsen, a former high school athlete, testified that she felt that it "hurts" girls' self-esteem "[w]hen you look to your counterparts, the males, and they are playing in the right seasons, they get all the benefits that come along playing in the right season, and then you look at where you are, I think it hurts [self-esteem]." (Tr. at 109:8-17, Kristi Madsen; Tr. at 16:7-17:10, D. Madsen (testifying that her daughter believed that she has to be "good enough to play on a boys' team" in order to receive equal benefits in athletics).)

Discriminatory treatment of girls also has an effect on boys. Boys receive the message that girls are inferior and are harmed by that message. (Tr. at 135:24-137:16, 141:18-142:2, Connie Engel[46] Testimony; Tr. at 671:22-25, L. Bunker.) As parent Connie Engel said, "This is creating a situation where [my son] believes that girls are second-class .... My children, my son and my daughters, don't get to experience [basketball's "March Madness"] together and they know that they are treated differently." (Tr. at 137:2-137:11, C. Engel.)

In addition, there are other harms, which could seem minor to some, but in the aggregate act to reinforce the inconvenience and unfairness of playing in a disadvantageous season. For example, girls playing sports outside of their traditional seasons have difficulties obtaining current season equipment for the sport. (Tr. at 35:7-37:11, D. Madsen; Tr. at 97:5-17, Kristi Madsen Testimony; Tr. at 114:6-17, Kelsey Madsen Testimony; Tr. at 494:9-556:1, D. Lopiano.) Girls also have diminished

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[46] Connie Engel is the mother of three children, two daughters and one son, who attended or currently attend Forest Hills Central High School and who all participated in or currently participate in interscholastic athletics there. (Tr. at 126:17-127:12, C. Engel.) She is also a founding member of CFE. (*Id.* at 134:19-20.)

opportunities for recognition in national athletic publicity and rankings, like USA Today's weekly Top 25 high school rankings, or all-America honors, like from Parade All-America or McDonald's All-American teams. (Tr. at 494:9-556:1, D. Lopiano.) In addition, Michigan girls are denied the experience of participating in promotional events like basketball's "March Madness," national shootouts, three-on-three tournaments, and similar competitions. (*Id.*)

Furthermore, Michigan's seasons differ from a majority of other states, or many other states, depending on the sport. Girls transferring in or out of Michigan schools mid-year can be prevented from playing a season of interscholastic athletics because they have missed the season. Playing out of a traditional season also limits one's choice of opponents, as well, including the ability to play teams in neighboring states. In addition, girls who end up playing in college must adjust to different collegiate seasons. (Tr. at 712:20-713:10, L. Bunker.)

Because the MHSAA schedules some girls' sports, *but no boys' sports*, in non-traditional seasons, girls, *but not boys*, must choose among sports they already play when they enter high school. (Tr. at 32:9-34, D. Madsen.) For example, girls who play sports in community recreation programs before high school often play with boys in the same, traditional and/or more advantageous seasons. (*Id.*) But when girls enter high school, they must choose between sports when some of those sports are scheduled in different seasons and create conflicts, and boys do not face this choice. (*Id.*)

Finally, participation opportunities for girls in the winter are limited, perhaps as a result of this scheduling. The MHSAA schedules five sports for boys in the winter, basketball, wrestling, ice hockey, skiing, and swimming and diving. (Tr. Exh. 63.) Three winter sports are scheduled for girls: volleyball, gymnastics, and skiing. Very few MHSAA member schools have girls' gymnastics or skiing teams, (Tr. Exh. 99), so most Michigan girls have the opportunity to

participate in one winter sport, whereas boys would have three or four, depending on the availability of boys' skiing and ice hockey. "The vast majority of Michigan high schools conduct only one sport for girls in the winter. Fewer than 20% sponsor two sports. Fewer than 2% sponsor three sports. The addition of girls swimming in the winter schedule at more than 200 schools fills a desperate need for many MHSAA member schools and their female athletes." (Tr. Exh. 44 (Editorial by MHSAA executive director John E. Roberts, 1990-91 MHSAA Bulletin).) Girls' swimming was later moved back to fall, however.

V. DEFENDANT MHSAA'S JUSTIFICATIONS FOR CURRENT SEASONS

The MHSAA has argued that the girls' sports at issue in this lawsuit are scheduled in superior or equal playing seasons. This is an argument that this Court wholly rejects after reviewing the facts presented at trial for the reasons described in the previous sections.

In addition, the MHSAA has presented a set of justifications for scheduling girls' seasons as it has that fall into the categories of available facilities, coaches and officials, i.e., concerns that logistical limitations require putting the sexes in separate seasons in order to maximize participation slots in every sport. These concerns, while legitimate, would at most permit the MHSAA to schedule girls' and boys' teams in separate seasons, but the two sexes would have to split advantageous and disadvantageous sports equally. It is clearly not equitable for girls to play in all of the disadvantageous seasons and for boys to play in none of them. Nonetheless, for reasons discussed both in the previous section and in this section, Defendant MHSAA presented insufficient evidence in all of the sports at issue that logistical concerns could not be resolved if both sexes played in the same season.

Finally, the MHSAA presented arguments that absolutely do not legally justify providing Michigan girls

with different and unequal treatment. These arguments were that Michigan girls prefer seasons as they are, which, among other problems, the Court found to be a dubious conclusion; that member schools prefer the current seasons; and that girls' programs need an "independent identity" from boys' programs, which is allegedly provided by putting girls in a different season. These are discussed below.

A. Logistical Concerns

1. Facilities

Ensuring the greatest number of participation opportunities for children in interscholastic sports is a legally legitimate goal, as well as wise policy. To this end, being able to sponsor freshman and junior varsity teams, larger squads, and maximum playing time for the most young people are also legally legitimate goals. (*See* Tr. Exh. 106.) Nonetheless, the Court is not convinced that the MHSAA's scheduling system maximizes participation or is the only method by which to maximize participation because insufficient evidence on these points was presented. Moreover, the Court finds that administrative convenience against a historical background of treating girls' athletics inequitably, and not actual empirical evidence, is a major cause of existing scheduling.

The MHSAA argues that it cannot schedule basketball, soccer and swimming concurrently for boys and girls because there are insufficient gymnasiums, soccer fields and pools in Michigan. (Tr. at 1139:18-19, T. Miller Testimony; Tr. at 1183:1-17, G. Phill; Tr. at 799:11-23, K. McGee.) To combine seasons in some or all separately-scheduled sports, the MHSAA argues, would have the effect of reducing participation opportunities for both boys and girls by forcing schools to cut team size or cut freshman or junior varsity teams.

However, considering that the MHSAA bore the burden of production and persuasion on this point, the evidence presented was insufficient to convince the Court. The evidence was almost exclusively anecdotal. For instance,

the MHSAA did not present enough evidence at trial to demonstrate how many schools have inadequate facilities to allow girls and boys to swim or play soccer in the same season. In terms of pool space, thirty of the forty-three states sponsoring boys' and girls' swimming schedule the seasons concurrently. (Tr. at 1200:18-22, G. Phill; Tr. Exh. 256; Tr. Exh. 62.) The boys' and girls' swimming teams in Michigan's Upper Peninsula also swim in the same season. (Stip. Fact No. 47.) In addition to boys' teams, MHSAA member schools accommodate other teams in the winter by renting their pools to swimming club teams. (Tr. at 1187:21-1188:4, G. Phill.) Even assuming that Mr. Phill's assertion that the size of the Livonia-Stevenson pool would force him to cut participation on the Livonia-Stevenson girls' team is true, that says nothing about what alternatives have been considered, like community pools, or what the situation is in the rest of the state.

In terms of soccer field space, thirty-seven of the forty-eight states sponsoring boys' and girls' high school soccer schedule the seasons concurrently. (Tr. at 1162:16-20, T. Miller; Tr. Exh. 256 (1999-2000 National Federation Sport Season Survey).) Moreover, soccer fields in Michigan are now being used concurrently by boys and girls because girls' club teams are playing in the fall (when boys' high school teams are playing) and boys' club teams are playing in the spring (when girls' high school teams are playing). (Tr. at 1164:24-25, T. Miller.) The soccer situation is similarly unclear to this Court to make a finding that logistical problems would exist in the event that girls and boys played in the same season.

Assertions have been made that some schools may have difficulties accommodating both girls and boys in the same season in swimming and/or soccer, but it does not suggest to what extent this would be a problem. More importantly, there was no indication whether any facility alternatives are possible and have been considered, or if the position that facilities are simply inadequate to accommodate girls and

boys at the same time throughout Michigan has been adopted without further study because that is the conventional wisdom.

The MHSAA did not present any evidence that boys and girls cannot play tennis or golf in the same season. Moreover, there was evidence at trial, which the MHSAA did not refute, that girls and boys can play basketball in the same season with little difficulty, if any, if girls' volleyball is moved to the fall season.

In terms of gymnasium space, a school with a single gym can accommodate boys' and girls' basketball teams practicing and playing concurrently. (Tr. at 459:22-460:12, J. Magelssen (testifying that most Michigan schools in Classes A, B, C and D have one gym that accommodates various indoor sports simultaneously); Tr. at 941:1-8, James Glazier[47] Testimony (testifying that there would be no problem at his current school and previous school if volleyball and girls' basketball facilities were switched).) For instance, Michigan high school gyms already have boys' basketball and girls' volleyball teams practicing and playing concurrently.

Practice times can be alternated weekly or each season so that boys practice right after school one week or season and the girls practice right after school the next. (Tr. at 517:20-25, D. Lopiano.) Boys' and girls' basketball games can likewise be played in the same season through "normal scheduling mechanisms" used in the 48 states in which boys and girls play basketball at the same time. (*Id.* at 517:17-518:11.) For example, boys' and girls' games can be scheduled so that one team or the other is playing at home, or they can play doubleheaders and flip-flop times in a doubleheader so that girls and boys have an equal opportunity for prime time. (*Id.*) Girls' basketball teams

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[47] Mr. Glazier is former athletic director at Grandville High School and is currently assistant principal at Caledonia High School. (Tr. at 916:6-12, J. Glazier.)

currently do not have to share gym space with volleyball or boys' basketball teams. But "having the gym to yourself [is not] a justifiable reason for treating boys different from girls." (Tr. at 833:15- 834:4, K. McGee.) In addition, playing in the fall, with no other teams needing gym space then, has not given at least some girls' basketball teams the ability to play games on Friday nights, since boys' football plays that night. (Tr. at 93:16-94:9, Kristi Madsen.)

It is true as the MHSAA points out that if girls' volleyball and basketball were switched, and girls' volleyball players had increased opportunity to play club volleyball, they would have to make a choice between club volleyball and high school basketball. (Tr. at 1050:25-1051:9, 1062:14-1063:4, P. Wilson.) Nonetheless, this is a choice for a young woman and her family to make, not the MHSAA. Girls are entitled to equal opportunities to be able to make these choices.

The MHSAA points to the high ranking of Michigan among the states for numbers of boys and girls participating in various sports as evidence that the current scheduling of seasons maximizes participation opportunities and argues that scheduling is the reason why participation numbers are what they currently are. (*See* Tr. Exh. 219 (1999-00 National Federation Sports Participation Survey).) The argument is that other states, who in many sports schedule both sexes in the same season or schedule girls in a different season than Michigan does, have lower participation numbers than Michigan because those states' scheduling creates problems that decrease participation opportunities for students. This is circumstantial evidence that simply proves little, in that the comparison between Michigan's participation numbers and other states' participation numbers is not apt.

First, one would expect Michigan to rank at least eighth in the nation in numbers of participants in each sport, since Michigan has the eighth highest population in the country. *See* 1999-2000 Census. So ranking among the top ten states

in a sport's participation numbers is not particularly instructive. Even where Michigan ranks higher than eighth, there are an unlimited number of other factors that influence participation numbers besides seasons, like school funding in general and athletic program funding in particular, the number of schools in a state sponsoring a particular sport, cultural attitudes in a state, the influence of weather on outside sports, etc. Without more, the Court cannot draw the conclusions from this data that the MHSAA asks be drawn.

2. Officials and Coaches

The MHSAA argues that it cannot schedule soccer and swimming for boys and girls concurrently because there are insufficient numbers of coaches in Michigan. (*Id.* at 1139:20-23, T. Miller; Tr. at 1189:14-24, G. Phill.) Similarly, the empirical evidence on this point was too sparse to make a finding that this is true. The circumstantial evidence that logistical problems could be resolved or would not exist in the first place was just as strong.

The MHSAA further argues that it cannot schedule soccer for boys and girls concurrently because there are insufficient numbers of officials in Michigan. (Tr. at 1140:8-13, T. Miller.) There are no special qualifications to officiate soccer matches between MHSAA member schools. A prospective official need only register with the MHSAA, which involves passing an open-book examination on MHSAA's rules and regulations, and pay a registration fee to the MHSAA. (Tr. at 1158:17-20, T. Miller.) The MHSAA asserted, but did not demonstrate, that some schools could have trouble finding "qualified" MHSAA-registered game officials, but there was little evidence that MHSAA-registered game officials would be unqualified if more were needed in a single season or if the existing officials were needed for more games during a single season.[48]

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[48] In addition, Ms. Norman-Nakamura, who testified on behalf of Plaintiffs, agreed on cross-examination that she is aware that some

Thirty-seven states, as well as Upper Peninsula schools, are able to schedule boys' and girls' soccer concurrently. (Tr. Exh. 256; Stip Fact No. 47.) Presumably, the Upper Peninsula[49] and those other states have enough officials and coaches. Thirty states are able to schedule boys' and girls' swimming concurrently and presumably provide an adequate number of coaches. Upper Peninsula schools likewise have boys and girls swim in the same season with a presumably adequate number of coaches. (Stip. Fact No. 47.)[50]

B. Michigan Girls Prefer the Current Seasons

The MHSAA asserts that, based on a survey that it commissioned Western Michigan University's Evaluation Center to conduct after this lawsuit was filed, Michigan girls prefer to play in the current seasons. (Tr. at 1014:22-1016:9, 1020:21-23, Daniel Stufflebeam[51] Testimony; Tr. Exh. 254 (4/15/99 Sports Seasons Survey Final Report).) The Court reads the results of that survey differently than the MHSAA does, as discussed below. Moreover, the Court

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volleyball coaches oppose changing the girls' season because they believe that volleyball officials would not be as available during the fall season when college teams compete. (Tr. at 278-283, B. Norman-Nakamura.) However, the MHSAA did not offer the testimony of coaches holding these beliefs, nor any other evidence to support this claim.

[49] Clearly, the Upper Peninsula has a much smaller population than most states and the Lower Peninsula of Michigan, but the Upper Peninsula's experience is comparable in that while the number of teams, and thus the number of officials and coaches needed, would be smaller, so would the total population from which those officials and coaches could be drawn.

[50] Moreover, there was only some discussion of whether it would be possible for boys and girls to be coached by the same individual and/or practice together to save resources like coaches and facility usage. If such an arrangement were logistically possible and outweighed other disadvantages, Plaintiffs' experts also testified that there is psycho-social benefit to boys and girls training together where appropriate.

[51] Dr. Daniel Stufflebeam is director of the Evaluation Center at Western Michigan University, which conducted the survey for the MHSAA. (Tr. at 986:13-17, 998:21-999:9, D. Stufflebeam.)

notes that while a number of accomplished high school and college student-athletes testified about the disadvantages of the current seasons, the MHSAA did not offer the testimony of any girl or parent who was in favor of keeping the current seasons.

In addition, the survey suffers from design flaws and bias, some of which the Court will review here. Dr. Stufflebeam testified that the survey form listed potential negative consequences of moving the girls' seasons at issue in this case and asked girls how objectionable they found those consequences. (Tr. at 1036:11-1037:6, D. Stufflebeam; Tr. Exh. 254 at 18.) No benefits of changing the seasons were presented to the surveyed girls. (*See* Tr. Exh. 254.) Further, Dr. Stufflebeam testified that the potential negative consequences identified in the survey were provided by the MHSAA's attorneys. (*Id.* at 1037:7-1038:23.) No consultation was done with Plaintiffs' attorneys for suggestions of positive benefits to changing seasons to ask girls about in the survey, nor was any independent analysis conducted to determine the potential benefits and detriments of moving any seasons. This was likely because of the time pressures involved in conducting this survey under the parameters placed on the Evaluation Center by the MHSAA's attorneys, based on when it was needed for this litigation. (*Id.* at 1020:21-1023:23, 1031:7-20.)

Sixty of MHSAA's 729 member schools participated in the student survey. (Tr. at 1026:6-13, D. Stufflebeam.) Only one-third of the girls in these 60 schools were surveyed, and nearly one-third of respondents participated in sports that are not played in disadvantageous seasons. (*Id.* at 1026:6-13, 1029:3-6.)

In addition, the original, written survey responses were destroyed after the data from them was entered into a database, but before Plaintiffs or their expert could review them. (Tr. at 1029:16-1030:5, D. Stufflebeam.) Thus, it is impossible to tell what subjective answers where girls could write comments match to what objective responses to the

objective questions, and therefore, it is impossible to ascertain why girls with certain opinions may have held those opinions.

Even setting aside these flaws, the Court is not at all convinced that the survey results themselves support the MHSAA's position that Michigan girls largely prefer current scheduling. In responding to the question of whether "all high school sports seasons should be the same as college," for example, 31.4 percent of the respondents said no, 31.3 percent said yes, and over 37 percent had no opinion. (Tr. at 1030:13-22, D. Stufflebeam; Tr. Exh. 254 at 26.) This is hardly overwhelming support for maintaining current, non-traditional seasons employed by most of the girls' seasons at issue in this lawsuit.

Moreover, some of the survey responses of the female athletes that indicated that some of those who opposed changing seasons did so because they feared boys would receive better treatment and practice times if the girls moved to the same playing seasons as boys. (Tr. Exh. 254 at 39 *et seq.*; Tr. at 1031:7-1035:9, D. Stufflebeam.) If girls and boys play a sport in the same season, however, individual schools are under legal obligation to give girls and boys equal treatment in practice and game times, for example.

In addition, the Court has some concern that girls would indicate a desire not to change simply in order to avoid being branded troublemakers or because they have come to believe that an inequitable situation is their lot in life. For example, one respondent said, "I think sports seasons are good the way they are—I would like girls' sports to be a bigger deal, but I don't want to put up a stink." (Tr. Exh. 254 at 43.) In sum, the collection of opinions of girls presented from the WMU Survey does not show that the current seasons are equitable or even that Michigan girls believe that they are equitable.

C. Member Schools Prefer the Current Seasons

The MHSAA argues that the majority of member schools, most recently in 1998, have indicated that they

prefer the current seasons. (Tr. Exh. 39 (1998 Survey Form); Tr. Exh. 229 (1973, 1979, 1981, 1985 & 1994 School Surveys).) The Court notes first that if, after applying the facts to the law, the seasons as they have been currently set by the MHSAA violate the law, they violate the law regardless of the preferences of the member schools.

To the extent that the Court has considered preferences of the member schools, as the Court could ascertain those through the available evidence, it has only been in the context of assuming that member schools may have had actual non-discriminatory reasons based on empirical facts for preferring certain seasons for certain sports over others.

It is also possible, however, that school representatives may prefer seasons the way they are simply for administrative convenience, since school representatives have a great deal else to do every day besides consider this one issue. The Court has also considered this possibility and has thus given very little weight, if any, to the member schools' preferences, as expressed on the MHSAA surveys, as an indication of whether the current sports seasons are legally equitable. A comprehensive study of the possibilities of changing seasons, as well as the advantages and disadvantages of various seasons, should have been the task of the MHSAA. The Court has instead relied much more heavily on the facts presented in this litigation regarding the benefits and disadvantages of different seasons for different sports.

In addition, the form of the MHSAA's surveys over the years made them of very little use to this Court. For example, the MHSAA prepared two draft survey forms for its 1998 survey. (*See* Tr. Exh. 40.) One form asked the schools for their position on each separate sport (so that a school could indicate whether, for instance, it would favor moving basketball and volleyball but not swimming). The second form, which MHSAA actually sent the schools, asked the schools for their position on whether all sports should be moved with no option to vote in favor of moving certain

sports but not others. (*Id.* at 2.) The straight, "up or down" vote approach, which is the one that was used, has obvious limitations, since there are a number of ways in which seasons scheduling could be changed. In addition, the survey form used provided information only on potential coaching conflicts based on current coaching arrangements, but does not provide any other information as to whether additional coaches could be hired. (*Id.*) Finally, the survey provided no look at schools' other reasons for desiring the status quo. (*Id.*)

Finally, the MHSAA has placed sports seasons without regard to survey results or moved sports seasons without first surveying member schools, including boys' golf, girls' soccer and girls' swimming. (Tr. Exh. 29 at 2; Tr. Exh. 10(d) at 5; Tr. Exh. 81 at 1.) More member schools (sixty) voted to schedule the soccer seasons separately than those who wanted the seasons together (eighteen), but most schools expressed no preference (507) or otherwise did not vote on this issue or at all. (Tr. Exh. 229 (1981 Survey—Soccer).) After the MHSAA placed both soccer seasons together in the fall, several school administrators complained, and girls' soccer was moved to spring. (Tr. Exh. 47 at 3; Tr. Exh. 10(d) at 5.) The MHSAA originally placed girls' basketball in the fall even though girls' basketball coaches and many schools originally wanted to stay in winter, where it was before it was sanctioned by the MHSAA, and ignored the initial vote of girls' basketball coaches to move the season back to winter. (Tr. Exh. 78.) The MHSAA unilaterally moved girls' swimming in 1990- 91 from fall to winter "as a matter of fairness, a matter of trying to do the most good for the most number of girls," before it was moved back to fall. (Tr. Exh. 44.)

D. Giving Girls an "Independent Identity"

The MHSAA asserted at trial that playing basketball in the fall rather than the traditional winter season benefits girls because they do not have to compete with boys' basketball for attention of many kinds, and thus receive

increased recruiting opportunities and media coverage. (*See* Tr. at 794:3-22, 796:14-16, K. McGee.) Ms. McGee, the MHSAA witness who offered the assertion, said she felt that putting girls in a separate basketball season demonstrated that girls could bring fans out to their games and be successful in basketball without a contemporaneous companion boys' team in the same season. (*Id.* at 794:3-17.) But Ms. McGee also acknowledged that it is true that if MHSAA moved the girls' basketball season to the winter, Michigan girls would be placed on an "equal footing" with Michigan boys and girls in the rest of the country. (*Id.* at 851:18-852:4.)

The concept of having an "independent identity" is also based on the premise that boys will "overshadow" girls in fan support and media coverage if boys and girls play basketball in the same season. (Tr. at 829:23-830:1, 846:3-7, 849:4-850:6, K. McGee.) This conflicts with giving girls a separate season so they can prove that their program stands on its own. With all due respect to Ms. McGee, who obviously cares a great deal about coaching and the girls that she coaches and only wants the best for female players, the Court finds that separate basketball seasons sends a message that the girls' basketball programs cannot be "fitted in" to the "regular" basketball season of winter. Girls' basketball programs, however, are just as important as boys' programs, and girls deserve to play in the "regular" season, too.

In addition, to achieve this "independence," girls, among other things, play basketball on two school nights because "football is on Friday nights" in the fall. (Tr. at 825:24-828:11. K. McGee.) The winter season makes it feasible for boys to play basketball on Tuesdays and Fridays. (*Cf.* Tr. at 94:2-6, Kristi Madsen.)

Ms. McGee's assertion that girls' basketball in the fall receives more media coverage than boys' football in the fall is based on girls playing twice a week, and therefore receiving post-game coverage twice a week, and boys

playing football once a week, and therefore receiving post-game coverage once a week. (Tr. at 832:9-25, K. McGee.) Ms. McGee, however, provided no documentation supporting her assertion that girls receive more media coverage in the fall compared to boys' football. (*Id.*) In addition, Ms. McGee coaches one of the most successful girls' basketball programs in Michigan. Other girls' basketball programs may very well not receive the same quantity and quality of media coverage that Flint Powers' program does, even if playing in the fall season has some effect on the quality and quantity of media coverage received generally.

Moreover, Dr. Linda Bunker testified that if girls were in fact to receive less media coverage compared to boys by playing basketball in the winter, it is better preparation for adulthood for girls to recognize this and decide for themselves how they will handle situations that they view as inequitable. (Tr. at 738:10-25, L. Bunker.) If girls "ha[ve] the opportunity to visually see they are not being given the same amount of press coverage, then they have an opportunity to do something about it, whether it's they or the newspapers or the parents or the community, have a chance head on to address the issue of inequities." (*Id.*)

CONCLUSIONS OF LAW

I. PLAINTIFFS' FOURTEENTH AMENDMENT CLAIM

A. Defendant MHSAA is a State Actor

The Fourteenth Amendment to the United States Constitution provides, "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. To be liable under 42 U.S.C. § 1983 for violating the Fourteenth Amendment, an entity such as Defendant must be considered a "state actor."

The United States Supreme Court found recently that another state's high school athletic association, the Tennessee Secondary School Athletic Association (TSSAA), was a "state actor" after considering facts regarding the TSSAA's make-up and role in the administration of high school athletics in Tennessee. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). The Supreme Court noted that, "The nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Id.* at 298, 121 S.Ct. 924. Among the facts that the Supreme Court found relevant to reaching this determination were a TSSAA membership of predominantly public schools; revenue coming from membership dues and gate receipts from tournaments held at member schools; state officials given *ex officio* status on the legislative council; and eligibility of TSSAA employees for the state employees retirement system. *Id.* at 298-300, 121 S.Ct. 924. The Supreme Court noted that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, and that mechanism took the form of public school officials acting together under the auspices of the TSSAA. *Id.* at 299, 121 S.Ct. 924.

When the Sixth Circuit held that the TSSAA was not a state actor, the MHSAA was adamant that it was very similar in structure to the TSSAA. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir.1999); (Supplementary Motion by Defendant MHSAA, 9/1/99, Dkt. No. 183; Renewed Motion by Individual Defendants, 9/1/99, Dkt. No. 182 ("the nature and function of the MHSAA is virtually *identical* to that of the TSSAA") (emphasis added).) This Court, however, felt that other decisions of the Supreme Court and other federal circuits necessitated the conclusion that the TSSAA was a

state actor. *Communities for Equity*, 80 F.Supp.2d at 738. Thus, there was still an open factual question for trial whether the MHSAA was a state actor, even though based on the facts presented at that time, this Court agreed with the MHSAA that it was nearly identical to the TSSAA. *Id.*; (Order, 8/31/01, Dkt. No. 452.)

The Supreme Court eventually reversed the Sixth Circuit, finding that the factual inquiry proved the TSSAA to be a state actor. *Brentwood Academy*, 531 U.S. at 298, 121 S.Ct. 924. Similarly, this Court finds that the facts presented at trial clearly necessitate a finding that the MHSAA is a state actor.

The purpose of the MHSAA—to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state—is virtually the same as its Tennessee counterpart. The MHSAA has a membership of predominantly public schools and almost every eligible public school belongs. Its revenue is derived from gate receipts from tournaments held at member schools and broadcast fees, among other items, revenues to which schools would otherwise be entitled. The membership of the MHSAA's Representative Council includes a representative of the state superintendent of education and is comprised of mostly public school employees acting as representatives for their schools. Some MHSAA employees continue to be eligible for participation in the state employee retirement system. Moreover, the MHSAA exercises adjudicative power over the schools with its ability to investigate and determine rules violations and resultant sanctions.

Just as the Supreme Court recognized that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, that mechanism in the State of Michigan takes the form of public school officials acting together under the auspices of the MHSAA. This is clearly correct and strongly supported by the evidence presented in this case. For example, Ms. McGee, now a member of the Representative Council, said,

"[I]t would be chaos" with "a system of high school sports where there is not a level playing field ... by when [schools] compete against each other." (Tr. at 869:8-14.) In addition, the MHSAA's own position paper on school choice notes that,

> Over the years, responsibility for regulating interscholastic athletics changed hands and organizations changed names, but always there have been provisions for statewide governance of interscholastic athletics. The MHSAA has been the serving and controlling organization for 67 years .... [T]he need for coordination of rules between districts [in non-athletic activities] has never risen to a level that a statewide regulatory body has been created to enforce a statewide code of rules and penalties [like in athletics].

(Tr. Exh. 22 at 3.) Finally, the MHSAA's developmental history is evidence of the fact that the State of Michigan felt that such a body was needed. Its legal status and official designation may have changed over the years, but as this Court has said before, the crucial question of its relationship with Michigan schools has not.

Being found to be a "state actor" is not a punishment, as Defendant suggests. (*See* Defendant's Proposed Findings of Fact and Conclusions of Law, 10/24/01, Dkt. No. 515 ("How long must the MHSAA pay for its historical relationship with the State that was ended through the legislative process in 1971?").) To the extent that it is a burden to ensure compliance with the Fourteenth Amendment to the United States Constitution, it is the honorable burden and duty of all entities and individuals acting with the power entrusted to them by their fellow citizens to ensure that they treat all American citizens fairly and with due regard for their rights. The role that the MHSAA has assumed, and particularly the power that it has been given to fulfill that role, leaves this Court with the firm conclusion that

"there is no substantial reason to claim unfairness in applying constitutional standards to it." *See Brentwood Academy*, 531 U.S. at 298, 121 S.Ct. 924.

B. Michigan Girls Have Been Denied Equal Protection By Current Seasons

To state a Fourteenth Amendment claim, Plaintiffs must also allege that Defendant treats high school boys differently from girls. *See United States v. Virginia*, 518 U.S. 515, 532-33, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Once Plaintiffs have established a gender classification, the burden of justifying the classification shifts to Defendant, and the justification must be "exceedingly persuasive." *Id.* Defendant

> must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 533, 116 S.Ct. 2264 (citations omitted). It is undisputed that Defendant intentionally treats boys and girls differently by scheduling their interscholastic sports seasons at different times of the year. Girls are treated differently from boys in two ways. First, some of the sports that girls are offered that are the same as offered to boys, e.g., basketball and golf, are played in a different season than the boys play. Second, volleyball, the only sport at issue with only a girls' team, is played in a season different from the "traditional" volleyball season, whereas no sport with only a boys' team, e.g., football or wrestling, is offered in a "non-traditional" season.

Thus, the remaining question for this Court to decide is whether Defendant meets its burden of establishing an "exceedingly persuasive" justification for treating girls and boys differently. In other words, this Court must determine if Defendant's classification of boys and girls via their sports teams' placement in the current seasons "serves important governmental objectives," and the chosen scheduling is "substantially related to the achievement of those objectives." *See id.* at 533, 116 S.Ct. 2264. The Supreme Court, while discussing the "exceedingly persuasive" standard for sufficient justification, noted that its current direction in cases of classification by gender focused on the differential treatment or denial of opportunity for which relief is sought. *Id.* at 532-33, 116 S.Ct. 2264.

Animus on the part of Defendant is not required for a finding of a Fourteenth Amendment violation where a rule or classification treats males differently from females on its face. Here, the classification of the MHSAA mandates that, for example, boys will play tennis in the spring, but g[illegible]s will play tennis in the fall. That is a classification that on [illegible] face treats boys and girls differently. In another case involving a sex classification, *United States v. Virginia*, Virginia was found to have denied women equal educational opportunity on the basis of sex by refusing to allow any woman to attend Virginia Military Institute (VMI). *See* 518 U.S. at 530-534, 116 S.Ct. 2264 (citing other cases of facial classification by sex creating unlawful discrimination, like *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (holding unconstitutional an Idaho law requiring that when several persons are equally entitled to administer a decedent's estate, males must be preferred to females); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (holding unconstitutional a Utah law that parents support male children until age 21, but support female children only until age 18)).

Virginia was not, however, found to have displayed animus toward women in excluding them from VMI. 518

U.S. at 532-34, 116 S.Ct. 2264. Such a finding must be made in cases of discrimination shown through disparate impact, where a rule or classification treats males and females the same by its terms, but the effect of the law is different on males and females. In those cases, intentional discrimination must be proven by showing that the body adopting the law or classification did so with the intent of discriminating against one sex or other protected group, i.e. some kind of animus. *Washington v. Davis*, 426 U.S. 229, 241-242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (where the District of Columbia required all police officer applicants to pass exam, and fewer black applicants passed than white applicants, test did not deny equal protection unless exam was used for invidious, discriminatory purposes instead of legitimate purposes). For example, where the Kentucky High School Athletic Association had a rule requiring that 25 percent of its member schools indicate a willingness to sanction a new sport before that sport would be sanctioned, female athletes claimed that the rule disproportionately served to deny them sports opportunities. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 269 (6th Cir.1994) (*Horner I*). Because the rule did not treat females differently from males in its requirements, the athletes had the burden of proving intentional discrimination by showing that the *facially neutral* "25 percent rule" was adopted for the purpose of denying them opportunities, and not for a legitimate purpose. *Id.* at 272.

It is common sense that it is not necessary to find animus, i.e., a discriminatory purpose, for a Fourteenth Amendment violation to be present in the case of a classification that on its face differentiates between males and females. If a class of persons is treated differently because of an immutable characteristic like sex, and that different treatment harms that class of persons for reasons not justified by an "exceedingly persuasive" justification, the affected class of persons is no more or less harmed by the unjustified discriminatory treatment merely because

Defendant does or does not have animus toward them. A Fourteenth Amendment violation can exist even if it was perpetrated by those who believe that they have honorable intentions.

Therefore, motive plays only a limited role in the case before this Court. If the scheduling of seasons harms female athletes, Plaintiffs need not prove that Defendant MHSAA scheduled male and female seasons differently with invidious intent to harm female athletes. But the MHSAA's "benign" justifications for different treatment are not to be accepted automatically, since tenable justifications must describe actual purposes of Defendant, not rationalizations for actions that were, in fact, differently grounded. *See Virginia*, 518 U.S. at 536-37, 116 S.Ct. 2264 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n. 16, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975)); *Califano v. Goldfarb*, 430 U.S. 199, 212-13, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977). *See also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (finding no resemblance between the "alleged objective" of excluding men from nursing school in order to engage in "educational affirmative action" benefitting women and the "actual purpose underlying the discriminatory classification," and thus rejecting the state's justification for the intentional discrimination on the face of the admissions rule) (*cited in Virginia*, 518 U.S. at 536, 116 S.Ct. 2264).

In addition, Defendant MHSAA cannot prevail by attempting to demonstrate that its intent was to help or protect girls by scheduling their sports when they have been if that "help" actually harms them or is based on paternalistic notions. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 684-85, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (finding that stereotyped distinctions between the sexes in law and official action at issue were made because of paternalistic notions where male military officers could automatically claim wives as dependents for extra benefits, but female

military officers had to prove that husbands were financially dependent to claim them as dependents).

As an initial matter, Defendant MHSAA is clearly responsible for the current placement of the sports seasons. Having the ability to set the beginning and closing dates of a season, to schedule the championship tournament, and to punish those who play the sport outside of the MHSAA-designated dates is obviously the ability to schedule a season. The fact that individual schools, conferences, and leagues decide competition dates within the parameters of the season is of no consequence. It is the parameters that determine what time of year a sport is played.

Defendant MHSAA must show that its classification between the sexes in scheduling sports' seasons serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives. The MHSAA's justification or justifications must be "exceedingly persuasive." The Court finds that the MHSAA has not met this burden.

The Court has concluded that none of the girls' sports at issue are scheduled in the advantageous season, for reasons fully explained in the Findings of Fact. The MHSAA's only other legitimate asserted objective for the separate scheduling, and in the case of volleyball, non-traditional scheduling, is to maximize athletic participation opportunities for both boys and girls. The MHSAA argues that its current scheduling system maximizes high school athletic participation opportunities by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team. The MHSAA also argues that the quality of the programs are maximized by the current scheduling, as well, as a result of the better officials and coaches being able to work over two separate seasons with both boys and girls, instead of splitting their time in one season between boys and girls or forcing schools to broaden the pool of officials and coaches,

opening up positions to people the MHSAA asserts would be less qualified individuals.

While these logistics-based objectives are "important," the Court concludes that the discriminatory scheduling is not "substantially related" to the achievement of those asserted objectives. The empirical evidence was wholly insufficient. The MHSAA chose to rely on anecdotal and weak circumstantial evidence instead, which is not enough. Even assuming that the MHSAA had sufficiently proven this point, that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems. Moreover, the logistics justification smacks of post hoc rationalization for a system that only in the relatively recent past decided that girls were entitled to play sports and be treated fairly in athletics. As a result, this Court comes to the conclusion that Defendant MHSAA violated and continues to violate the Fourteenth Amendment of the United States Constitution by its current scheduling of seasons for the sports at issue.

II. PLAINTIFFS' TITLE IX CLAIM

A. Defendant MHSAA is Subject to Title IX by Virtue of Its Controlling Authority Over Interscholastic Athletics in Michigan

Section 901(a) of Title IX of the Education Amendments of 1972 provides, with exceptions not applicable here, that "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681(a) (2001). For Plaintiffs to prevail on their Title IX claim, they must first establish that Defendant MHSAA is subject to Title IX.

This Court held earlier during the course of this litigation that "any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of

federal aid." *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F.Supp.2d 729, 735 (W.D.Mich.2000). Based on the findings of fact, the Court must decide the extent to which Defendant MHSAA exerts control over interscholastic athletic programs of Michigan high schools, which are almost all federal funding recipients, to determine if Title IX applies to Defendant. *Id.* at 738. If Defendant exerts controlling authority over the scheduling of interscholastic sports seasons in Michigan, Defendant will be subject to Title IX's non-discrimination requirement in its scheduling of the seasons.

In *NCAA v. Smith*, the Supreme Court expressly declined to consider whether "controlling authority" is a basis on which an entity can be subject to Title IX. *NCAA v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999). The Sixth Circuit Court of Appeals also has not considered the "controlling authority" question. This Court extensively outlined its reasons for finding that Congress intended to apply Title IX to those entities exercising controlling authority over a federal program or programs, whether or not the entity itself is a recipient of federal funding, in its previously published opinion in this case on this topic. *See Communities for Equity*, 80 F.Supp.2d at 733-35. Defendant MHSAA urges the Court to reconsider this position on this issue, but the Court declines to do so.

Defendant cites to an opinion by another federal district court taking the opposite position of this Court and holding that entities not receiving federal funds may not be held liable under Title IX. *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Illinois*, 134 F.Supp.2d 965, 970 (N.D.Ill.2001).[52] This Court, in previously discussing this issue, noted that the Supreme Court has previously held

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[52] Presumably because most Federal Circuit Courts, as well as the Supreme Court, have not taken up the issue, the court in *Johnny's Icehouse* recognized that its decision faced the "undeniable potential for a contrary ruling," as this Court recognizes that its decision does. *See Johnny's Icehouse*, 134 F.Supp.2d at 971.

that Title IX has "two related, but nevertheless somewhat different objectives ... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Communities for Equity*, 80 F.Supp.2d at 733 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 704, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). This Court then found that:

> Not only is Defendants'[53] suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the *Cannon* decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Communities for Equity, 80 F.Supp.2d at 734. The federal district court in *Johnny's Icehouse* criticized the above reasoning of this Court with the argument that a funding recipient, like a school, may be liable if it fails to respond appropriately to discriminatory acts of non-agent third parties. *Johnny's Icehouse*, 134 F.Supp.2d at 970 (citations

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[53] At the time of that opinion, the MHSAA and a number of individuals were Defendants in this suit, but the individuals have since been dismissed.

omitted). Therefore, "controlling authority" liability under Title IX is not necessary to achieve the purposes of Title IX. Further, the *Johnny's Icehouse* Court reasoned that "controlling authority" liability is not authorized by Title IX.

This Court, however, respectfully disagrees with that reasoning. It is true that the Supreme Court has held funding recipients not liable for the discriminatory actions of their "agents" under Title IX, pursuant to a *respondeat superior* theory, where there is no evidence that a funding recipient knew or should have known about the discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (*cited in Johnny's Icehouse*, 134 F.Supp.2d at 970). In Gebser, a case where a school was sued for its failure to prevent sexual harassment by a teacher against a student, the Supreme Court held that "a damages remedy will not lie under Title IX *unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf* has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989 (emphasis added).

However, an entity with "controlling authority" over a recipient is not an agent of the recipient by the very nature of their relationship; instead, the recipient becomes like an agent and the controlling entity like a principal in the relationship. In situations like the one in this case, the nature of what needs to be accomplished by a group of recipients (here, controlling and regulating athletics) requires that the funding recipient-schools cede their own ability to control many aspects of their schools' athletic programs to the controlling entity-athletic association. Thus, after the recipient schools cede authority, if a recipient school believes that an athletic association is illegally discriminating, that one school alone has no authority or ability to stop the athletic association, unless it can convince a sufficient number of other schools and those

schools together would be able to change the association's action.

A school's only immediate recourse to stop its own "participation" in the discrimination is to discontinue offering an athletic program to its students, since the school cannot realistically offer a program without belonging to the association. In effect, one individual school cannot, in fact, be held liable for the association's Title IX violation because the recipient-school no longer has the "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." *See Gebser*, 524 U.S. at 290, 118 S.Ct. 1989. It is true that "a funding recipient may be liable if it fails to respond appropriately to the discriminatory acts of nonagent third parties," *Johnny's Icehouse*, 134 F.Supp.2d at 971, but the law must fill the gap where the recipient has no effective way of responding appropriately because of its relationship with the third party. "Controlling authority" theory is needed to address this deficiency and effectuate the intent of Congress when it passed Title IX.

Moreover, contrary to Defendant MHSAA's other argument, "controlling authority" theory is consistent with what has been called the "contractual" character of Title IX. Title IX is legislation enacted under the Spending Clause, or in other words, is an exercise of Congressional power to fix the terms upon which federal funds will be disbursed. *Cf. Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 598-99, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (White, J.) (discussing Title VI); *see also Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986) ("Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

Against this background, *Johnny's Icehouse* found that imposing Title IX obligations on "any ... entity not in contractual privity with the federal government or without the power to decide whether or not to accept federal financial assistance—would not fit into the Spending Clause foundation for the statute." *Johnny's Icehouse*, 134 F.Supp.2d at 970.[54] However, the Third Circuit case that *Johnny's Icehouse* cited for that proposition specifically did "not suggest that an absence of privity means that in no circumstances may a controlling authority argument be viable; we note that those who truly assume control of federally-funded programs are in a position to accept or reject that control as part of a decision whether or not to receive federal funds indirectly." *Cureton v. NCAA*, 198 F.3d 107, 118 (3d Cir.1999). The Third Circuit instead suggested that an absence of contractual privity between the entity sued and the federal funding source should give a court caution in imposing Title VI, or Title IX, obligations on the entity sued. *See id.*

This Court has heeded the persuasive warning of caution from the Third Circuit, and after consideration, believes that "controlling authority" theory is consistent with the contractual nature of liability under Title IX. Normally, contractual privity between the entity sued and the federal funding source should be required to hold the entity liable under Title IX, and this is the situation covered when indirect recipients of federal aid are subject to the requirements of Title VI, Title IX or § 504. *See Grove City*

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[54] *Johnny's Icehouse* cited to an opinion discussing Title VI, but courts have generally drawn analogies between Title IX, Title VI, and § 504 of the Rehabilitation Act of 1973 because of the similarities in these laws. *See NCAA v. Smith*, 525 U.S. 459, 467-69, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999) (looking at case law interpreting § 504 of the Rehabilitation Act to interpret Title IX); *Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n. 4, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986) (Title VI case law can generally be relied on to interpret later statutes, like Title IX). This Court will draw the same analogies where case law concerns Title VI or § 504.

College v. Bell, 465 U.S. 555, 563-64, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984) (holding that college was subject to Title IX, even where students directly received the federal aid in loans and grants, but college was the indirect recipient of that aid).[55]

In another case, the Supreme Court held that airlines could not be subjected to a program-specific statute, § 504 there, because they were mere "beneficiaries" of federal funds, but not indirect recipients of airports' federal funding. *Paralyzed Veterans*, 477 U.S. at 607, 106 S.Ct. 2705 (citing *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984)). The Supreme Court there distinguished between colleges and airlines in these two cases by noting that an "intended recipient" of federal funds was liable under the program-specific statutes like Title IX, so colleges were liable because Congress meant to deliver money to them using college students as conduits, but airlines were not liable because Congress was not trying to aid them and they were mere beneficiaries of the funding. *See id.* at 606-07, 106 S.Ct. 2705.

In that vein, holding entities with "controlling authority" power over recipients liable under Title IX is consistent with the contract-like nature of Congress' power under the Spending Clause to set conditions for the use of federal money. A "controlling authority" over a funding recipient is more than a mere beneficiary of federal funds and is instead more like a recipient of the funds through its control of

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[55] *Grove City College* continues to be good law on the point for which this Court cites it. Part of *Grove City College* was subsequently superceded by Congressional action, however. The Supreme Court also held in *Grove City College* that Title IX was only intended to apply to the particular program or activity receiving the indirect assistance. *Grove City College*, 465 U.S. at 570-74, 104 S.Ct. 1211. Congress later enacted the Civil Rights Restoration Act of 1988 to clarify that the Supreme Court misinterpreted its intent in the coverage of Title IX and the other program-specific statutes, legislating instead that the coverage was broader than the specific program receiving assistance. *See* Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 Stat. 28 (1988).

important parts of the funding recipient's program. Congress grants federal money to states and school districts to help pay for educational programs generally, making non-discrimination conditions on the funds. When an educational program like interscholastic athletics requires a governing body like the MHSAA—a body having "controlling authority" over member schools in certain aspects of the educational program—the MHSAA accepts the conditions in which member schools must operate when it implicitly contracts with the federal government to become responsible for organization of interscholastic athletic programs funded in part by federal resources.

The MHSAA is not an indirect recipient of federal funds, because it does not receive dues from the coffers of member schools, which has been the basis of Title IX liability for other state high school athletic associations. *See Horner*, 43 F.3d at 272 n. 5 (finding the Kentucky High School Athletic Association to be subject to Title IX as an indirect recipient of federal funds). But the MHSAA receives revenues to which member schools would otherwise be entitled, like tournament receipts, souvenir sales, and broadcast fees, and it operates tournaments largely using public facilities and public employees. Moreover, the MHSAA's legislative functions are conducted by mostly public school employees representing their schools. Finally, the MHSAA understands its function as controlling and regulating certain parts of member schools' athletic programs and has thus implicitly contracted with the federal government and had notice to obey the conditions under which member schools receive federal funding, funding which helps schools run athletic programs in the first place.

Defendant MHSAA clearly is the "controlling authority" over schools when it comes to scheduling of the sports seasons. Again, the MHSAA's power to declare beginning and closing dates of a season and dates of championship tournaments, as well as to punish those who play the sport outside of the MHSAA-designated dates, is the power to

schedule a season. No member school alone or even in concert with many other schools has the power to do this. A single school or consortium of schools, no matter how large, would still have to seek action within the MHSAA to change seasons. Therefore, Plaintiffs' evidence has firmly proved that Defendant MHSAA exerts "controlling authority" over the scheduling of interscholastic sports in the State of Michigan such that the MHSAA must comply with the mandate of Title IX.

B. Defendant MHSAA Has Violated Title IX With Its Current Seasons Scheduling

Plaintiffs must next establish that Defendant MHSAA's current scheduling of interscholastic sports seasons violates Title IX. The Court finds that Plaintiffs have established a Title IX violation. The United States Department of Education, as a federal department empowered to extend federal financial assistance to any education program or activity, has been directed to promulgate rules and regulations consistent with the objectives of Title IX. 20 U.S.C. § 1682 (2001).

As applied to interscholastic athletics, the Department of Education has promulgated the following regulation:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such activities separately on such basis.

34 C.F.R. § 106.41(a). To the extent that Plaintiffs have demonstrated that female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would

otherwise enjoy if they were male, Plaintiffs have proved a Title IX violation.[56]

In addition, the federal agency originally charged with interpreting regulations and investigating alleged violations of Title IX has noted that elements of a program's structure like seasons of play can constitute a violation. Practices such as employing disadvantageous playing seasons for only one sex violate Title IX when the resulting harms are substantial enough to deny equal participation opportunities and benefits in athletics to students of one sex. *See* Department of Health, Education, and Welfare, Office for Civil Rights (OCR) Policy Interpretation, 44 Fed.Reg. 71413, 71416-71418 (1979). OCR also considers "[w]hether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity." *Id.* at 71418.

Finally, Defendant MHSAA continues to make the erroneous argument that it does with respect to Plaintiffs' Fourteenth Amendment claim that a claim under Title IX requires proof that the MHSAA had animus toward girls. It

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[56] Title IX claims in the area of athletics often fall into two categories corresponding to the regulations promulgated under Title IX: equal treatment claims, which this case presents, or effective accommodation claims. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 n. 1 (2d Cir.1999) (*cited in Pederson v. Louisiana State Univ.*, 213 F.3d 858, 865 n. 4 (5th Cir.2000)). Equal treatment claims derive from Title IX regulations calling for equal provision of athletic benefits and opportunities among the sexes. *Boucher*, 164 F.3d at 115 n. 2 (*cited in Pederson*, 213 F.3d at 865 n. 4).

The MHSAA agrees that Title IX assesses the athletic program of a liable party, but it also argues that Title IX does not assess the impact that "outside, business interests," like amateur athletic clubs and colleges and universities, have on these programs. That twists the issue. If discriminatory operation of the state's athletic programs through placement of seasons "denie[s] [girls] the benefits of, or ... subject[s] [girls] to discrimination" in interscholastic athletics such that girls' amateur and collegiate opportunities are limited in a way that boys' opportunities are not, Title IX is implicated.

does not. "Intentional discrimination" in the context of a Fourteenth Amendment violation means only that the MHSAA needs to have intended to treat girls differently from boys by intentionally scheduling them in different seasons than those in which boys play, which it clearly did, or by scheduling the girls-only sport of volleyball in a "non-traditional" season when boys-only sports are always played in "traditional" seasons, which it clearly did. As explained *supra*, that kind of "intentional discrimination" can be justified under certain circumstances, even though the Court has found that in this case it is not.

A Title IX violation similarly does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated. Different treatment can still result in equal opportunities for boys and girls, but it also may not, which is the reason for analyzing and comparing the benefits and the burdens of the differential treatment.

Language in a Fifth Circuit case is relied on by Defendant MHSAA who asserts that Title IX requires Plaintiffs to show that Defendant intended to harm girls in the scheduling of their seasons. *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir.2000). In that case, it was clear that Louisiana State University (LSU) was providing unequal athletic opportunities for its female students, for example, by only sponsoring new sports for women that administrators considered "more feminine" sports or by refusing to sponsor fast-pitch softball because "the women might get hurt." *Pederson*, 213 F.3d at 881. The federal district court there found that LSU was violating Title IX, but for the purposes of deciding whether monetary relief was due to Plaintiffs in addition to injunctive relief, the district court determined that the

discrimination was unintentional and thus Plaintiffs could not obtain monetary relief. *Pederson*, 912 F.Supp. 892, 917 (M.D.La.1996). The district court still ordered injunctive relief, however, on the basis of the Title IX violation. *Id.* at 921. That is the only kind of relief requested in this lawsuit.

After reviewing the facts, the Fifth Circuit reversed the district court's finding that the LSU discrimination was unintentional, held that LSU was intentionally discriminating between women and men, and held that the district court erroneously dismissed the monetary damages claims. *Pederson*, 213 F.3d at 884. But in determining whether an "effective accommodation" violation of Title IX was present, which is unlike the "equal treatment" violation alleged here, the Fifth Circuit affirmed the district court's finding that LSU was not effectively accommodating the sports interests of its female students. *Id.* at 879.

Pederson held that regulations promulgated under Title IX guide a court's analysis as to whether a violation has occurred. *Pederson*, 213 F.3d at 879. This is the analysis that this Court has articulated: in an "equal treatment" violation under Title IX, the question is whether female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would otherwise enjoy if they were male.

In the Findings of Fact, the Court found that all of the girls' sports at issue where a counterpart boys' team exists are subject to disadvantages to which they would not otherwise be subject if they played in the seasons that the boys do. Moreover, the Court found that girls who play volleyball in the non-traditional season in which it is now scheduled suffer disadvantages that they would not otherwise suffer if they were male and participated in a boys-only sport that was scheduled in its traditional season. As a result, this Court comes to the conclusion that Defendant MHSAA violated and continues to violate Title IX by scheduling seasons of the sports at issue in the manner in which it has.

III. PLAINTIFFS' ELLIOTT-LARSEN CIVIL RIGHTS ACT CLAIM

There are two provisions of the Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101, *et seq.*, Michigan's civil rights statute, at issue in this litigation. One applies to the acts of "educational institutions." The other applies to discrimination in the provision of public accommodation and/or public services. Under the ELCRA provision prohibiting discrimination in Michigan in the provision of a public service or public accommodation, this Court finds that Defendant MHSAA violated Plaintiffs' rights under the ELCRA.

A. Mich. Comp. Laws § 37.2402

First, "educational institutions" are prohibited from discriminating against individuals in their benefit from the institution, or services, activities, or programs provided by the institution, on the basis of an individual's sex. Mich. Comp. Laws § 37.2402 (2001). The definition of "educational institutions" includes "an agent of an educational institution." Mich. Comp. Laws § 37.2401 (2001). Therefore, if Defendant qualifies as an agent of the schools that comprise its membership, Defendant is subject to the ELCRA under this provision of the ELCRA.

"Agent" is not defined in the ELCRA. This Court's research turned up no Michigan cases, nor any federal cases interpreting Michigan law, defining what an "agent" of an "educational institution" is for purposes of the ELCRA. Under Michigan law generally, in determining "[w]hether an agency has been created," a court is to consider "the relations of the parties as they in fact exist under their agreements or acts." *St. Clair Intermed. Sch. Dist. v. Intermediate Educ. Ass'n/Michigan Educ. Ass'n*, 458 Mich. 540, 557, 581 N.W.2d 707 (1998) (quoting *Saums v. Parfet*, 270 Mich. 165, 170-171, 258 N.W. 235 (1935)). The Michigan Supreme Court has noted that in its broadest sense agency "includes every relation in which one person acts for or

represents another by his authority." *Id.* An agent is a business representative whose function it is to bring about, modify, affect, accept performance of, or terminate contractual obligations between the agent's principal and third persons. *Id.* at 557-58, 581 N.W.2d 707. Also fundamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to the agent. *Id.* at 558, 581 N.W.2d 707 (citations omitted).

The Court finds that the MHSAA cannot be liable to ELCRA claims under this section because it cannot be considered its member schools' agent. The Michigan Supreme Court has said that it is "fundamental" to finding that one party in a relationship is an agent that the principal be able to control the conduct of the agent with respect to the matters entrusted to the agent. One member school alone cannot control the actions of the MHSAA, so the MHSAA is not the "agent" of any one member school.

Moreover, the member schools together cannot be considered a "principal" because they cannot together be one "educational institution" under the statute, as they in fact constitute many educational institutions. Additionally, the member schools have come together in the form of the MHSAA largely to make contracts among themselves, regarding eligibility rules, etc., which is an associational relationship, but not an agency.

B. Mich. Comp. Laws § 37.2302

The ELCRA also covers those entities providing public accommodation or public services. "Except where permitted by law, a person shall not: (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public services because of ... sex ...." Mich. Comp. Laws § 37.2302 (2001).

A "person" is defined as "an individual, agent, association, corporation, ... unincorporated association, the state or a political subdivision of the state, or any agency of

the state, or any other legal or commercial entity." Mich. Comp. Laws § 37.2103(g) (2001). Surely, Defendant MHSAA is a "person" for these purposes since it has incorporated itself with the State of Michigan. (Tr. Exh. 28 (MHSAA Articles of Incorporation).) It could also aptly be described as an "association" given its structure, and while it is not dispositive, the fact that the word "association" also appears in its name lends support to this conclusion.

In addition, this Court finds that the MHSAA provides both a "public service" and a "public accommodation." A "public service" includes "a tax exempt private agency established to provide a service to the public." Mich. Comp. Laws § 37.2301(b) (2001). Lions clubs were held liable under this section of the ELCRA and found to be both providing a "public service" and constituting a "public accommodation." *Rogers v. International Ass'n of Lions Clubs*, 636 F.Supp. 1476, 1479 (E.D.Mich.1986). The Court held that Lions clubs provided a "public service" because the volunteer efforts by its members were made available to the public. *Id.* The Court also found it important that the Lions were tax exempt. *Id.* To some degree that the Court could not fully determine, the MHSAA is also tax exempt. (*See* Tr. Exh. 36 (copies of MHSAA tax returns)). It certainly was established to provide a service to the public, the organization of interscholastic athletics in the state's schools, and it is still in existence for that purpose. Thus, the MHSAA qualifies as a "public service."[57]

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[57] Moreover, a "public service" also encompasses "a public facility, department, agency, board, or commission owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof ...." Mich. Comp. Laws § 37.2301(b) (2001). It is likely that the MHSAA could also qualify under this definition as well, since the political subdivisions for whom it acts as an agency or commission to control interscholastic athletics are local school boards and schools. These local school boards would otherwise have responsibility for organizing interscholastic athletics or would have to find another vehicle beside the MHSAA to do so. *See* Findings of Fact on Defendant MHSAA.

The MHSAA qualifies as providing a "public accommodation" as well. An event open to the public held in a public place is a place of "public accommodation." *Rogers*, 636 F.Supp. at 1479. For one, the MHSAA sponsors championship tournament events, held in public places and open to members of the general public. Additionally, the MHSAA facilitates the scheduling of interscholastic athletics generally with its activities, and athletic programs hold competitions in public places that are open to the general public on a regular basis. Similarly, the Michigan Supreme Court found that a township's athletic program offered to elementary school children is a "public accommodation" or "public service" under the ELCRA. *Cf. Department of Civil Rights ex rel. Forton v. Waterford Twp. Dep't of Parks and Rec.*, 425 Mich. 173, 202, 387 N.W.2d 821 (1986) (*Forton*) (apparently assuming that the program at issue qualified under Mich. Comp. Laws § 37.2302 and remanding for retrial and for application of the constitutional standard enunciated in the opinion).

The Michigan Supreme Court determined that the goal of the Michigan Legislature in adopting this provision of the ELCRA was to broaden the scope of those parties to whom civil rights legislation would apply in the State of Michigan, in contrast to comparable federal provisions. *Forton*, 425 Mich. at 188-89, 387 N.W.2d 821. Most notably, the ELCRA covers non-governmental conduct in the handling of public accommodations and services that federal provisions do not. *Id.* at 186, 387 N.W.2d 821.

C. Standard to Find Discrimination Under Mich. Comp. Laws § 37.2302

But the Michigan Supreme Court held that the goal of ELCRA was not to broaden the standard of equal protection, i.e., not to require stricter scrutiny of laws that classify on the basis of protected characteristics than federal law would, but instead to provide the same level of scrutiny of discriminatory classifications. *Forton*, 425 Mich. at 188-89, 387 N.W.2d 821. *Forton*, which also involved a claim

strikingly similar to this case, involved a challenge to a township's practice of assigning different seasonal schedules to township league teams for elementary school students on the basis of sex in its township athletic program. *Forton*, 425 Mich. at 190, 387 N.W.2d 821. The Michigan Supreme Court held that the applicable standard to determine whether unlawful discrimination has occurred because of a discriminatory classification is the same standard used under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Forton*, 425 Mich. at 190, 387 N.W.2d 821 (applying to "public accommodation" claims). *See also Alspaugh v. Comm'n on Law Enforcement Standards*, 246 Mich.App. 547, 555-56, 634 N.W.2d 161 (2001) (using intermediate scrutiny in ELCRA challenge by males to state police's different passing standards for males and females); *Garrett v. Board of Educ. of Sch. Dist. of City of Detroit*, 775 F.Supp. 1004, 1010 (E.D.Mich.1991) (citing *Forton*, 425 Mich. at 190, 387 N.W.2d 821).[58]

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[58] *Garrett* involved a challenge by girls and their parents to the establishment of all-male public school academies in Detroit. *Garrett*, 775 F.Supp. at 1005. Like the instant case, *Garrett* presented an intentional discrimination claim because the school system had a rule that on its face differentiated between males and females, i.e., female children were not permitted to attend an all-male, public academy. *See id.* at 1006 (proceeding to consider whether the claim serves "important governmental objectives" and that the discriminatory classification involved was "substantially related to the achievement of those objectives" because of the rule treating girls and boys differently in admission).

Another federal court in Michigan has stated that plaintiffs bringing an ELCRA claim under *either* an intentional discrimination or disparate impact theory must produce facts from which the finder of fact could reasonably infer unlawful motivation. *Sanders v. Southwest Airlines Co.*, 86 F.Supp.2d 739, 744 (E.D.Mich.2000). This Court respectfully finds that to be an erroneous interpretation of Michigan law.

The Michigan Supreme Court is the highest authority on the meaning of Michigan law. As explained in this opinion, the Michigan Supreme Court has held that ELCRA claims are evaluated under the same

standards as federal Equal Protection claims are. *Forton*, 425 Mich. at 190, 387 N.W.2d 821. Under federal law, an intentional discrimination claim does not require proof of discriminatory motivation because the challenged law or rule has already discriminated against a protected class on its face. *Cf. Virginia*, 518 U.S. at 532-34, 116 S.Ct. 2264 (compare *Washington v. Davis*, 426 U.S. at 241-242, 96 S.Ct. 2040). *Forton*, as an intentional discrimination case, employed the intermediate scrutiny standard for sex-based classifications that the U.S. Supreme Court still employs.

Sanders cites cases from the Michigan Court of Appeals for its proposition requiring discriminatory motivation in cases presenting a facial classification. *See Reisman v. Regents of Wayne State Univ.*, 188 Mich.App. 526, 538, 470 N.W.2d 678 (1991); *Meagher v. Wayne State Univ.*, 222 Mich.App. 700, 708-09, 565 N.W.2d 401 (1997); *Fonseca v. Michigan State Univ.*, 214 Mich.App. 28, 31, 542 N.W.2d 273 (1995) (*cited in Sanders*, 86 F.Supp.2d at 744). But cases to which *Sanders* cites are all disparate impact cases, so those type of cases *do* require proof of discriminatory motivation in addition to proof that a member or members of a protected class have been disparately impacted by a law, rule or decision otherwise neutral on its face. In turn, these Michigan Court of Appeals cases all cite to other disparate impact cases, all employment discrimination cases with the exception of *Fonseca*, containing a summary statement with the proposition that both intentional discrimination and disparate impact claims require proof of discriminatory motivation behind the decision, but none of them cite *Forton*. After *Forton*, that proposition was implicitly rejected by the Michigan Supreme Court. *Cf. Forton*, 425 Mich. at 190, 387 N.W.2d 821.

For citation history of Reisman, see Singal v. General Motors Corp., 179 Mich.App. 497, 502-03, 447 N.W.2d 152 (1989) (*cited in Reisman*, 188 Mich.App. at 538, 470 N.W.2d 678); *Dixon v. WW Grainger, Inc.*, 168 Mich.App. 107, 114, 423 N.W.2d 580 (1987) (*cited in Singal*, 179 Mich.App. at 503, 447 N.W.2d 152); *Jenkins v. Southeastern Michigan Chapter, Amer. Red Cross*, 141 Mich.App. 785, 793-94, 369 N.W.2d 223 (1985) (*cited in Dixon*, 168 Mich.App. at 114, 423 N.W.2d 580); *Michigan Civil Rights Comm'n ex rel. Boyd v. Chrysler Corp.*, 80 Mich.App. 368, 373 n. 3, 263 N.W.2d 376 (1977) (*cited in Jenkins*, 141 Mich.App. at 794, 369 N.W.2d 223) (discussing the pleading requirements for a disparate treatment, employment discrimination case).

For citation history of Meagher, see Reisman, 188 Mich.App. at 538-39, 470 N.W.2d 678 (*cited in Meagher*, 222 Mich.App. 708-09, 565 N.W.2d 401); *Lytle v. Malady*, 209 Mich.App. 179, 185 n. 1, 530 N.W.2d 135 (finding, without citation, that intentional discrimination and disparate impact are the same theory) (*cited in Meagher*, 222 Mich.App. at 709, 565 N.W.2d 401) (*Lytle* rev'd on other grounds, 456 Mich. 1, 566 N.W.2d 582 (1997))

Thus, the standard for decision under Plaintiffs' ELCRA claim is the same as under their Fourteenth Amendment claim. As stated in the above discussion of why Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment have been violated, the Court similarly finds that Defendant MHSAA has violated the ELCRA.

CONCLUSION

"Parents, athletes and spectators should insist on equality for women's athletics. It's nothing less than the law, and nothing less than women athletes deserve." -Editorial, *You Go, Girls*, St. Louis Post-Dispatch, July 13, 1999, at B16.

Unfortunately, the insistence required in this case took the form of legal action. The history of girls' sports lends a belief that girls' seasons were originally put in the seasons

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(partially vacated on other grounds, 458 Mich. 153, 579 N.W.2d 906 (1998)); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich.App. 641, 654, 378 N.W.2d 558 (1985) (*cited in Meagher*, 222 Mich.App. at 709, 565 N.W.2d 401); *Boyd*, 80 Mich.App. at 373 n. 3, 263 N.W.2d 376 (*cited in Brewster*, 145 Mich.App. at 654, 378 N.W.2d 558; *Schipani*, 102 Mich.App. at 617, 302 N.W.2d 307); *Jenkins*, 141 Mich.App. 785, 369 N.W.2d 223 (*cited in Brewster*, 145 Mich.App. at 654, 378 N.W.2d 558); *Schipani v. Ford Motor Co.*, 102 Mich.App. 606, 617, 302 N.W.2d 307 (1981) (*cited in Brewster*, 145 Mich.App. at 654, 378 N.W.2d 558) (*Schipani* recognized by *Kostello v. Rockwell Intern. Corp.*, 189 Mich.App. 241, 245, 472 N.W.2d 71 (1991) as routinely rejected by other panels on other grounds).

Fonseca was a claim by a student not accepted to an MSU graduate program that her rejection was for discriminatory reasons, similar to employment discrimination cases where an individual is fired or denied promotion for allegedly discriminatory reasons. *Fonseca*, 214 Mich.App. at 29, 542 N.W.2d 273. In *Fonseca*, the Court of Appeals made no statements with respect to claims proven through intentional discrimination shown through a rule or classification discriminatory on its face, but only concerned decisions allegedly made for discriminatory reasons, which must be proved to state a disparate impact claim. *See id.* at 31, 542 N.W.2d 273.

that they were for impermissible reasons, and they simply have not been moved because of inertia or out of concern for the inconveniences that boys' programs would face. Continued administrative convenience of being able to find facilities, coaches or officials more easily if girls and boys are in separate seasons also does not justify such a system where the separate seasons are not equal for girls. If lack of resources is indeed a reality that requires single-sex seasons in some sports, which was not proved to the Court's satisfaction, then that is a reality that boys must also share.

The MHSAA has provided examples to this Court where it has been pro-active in promoting gender equity in sports. While the Court applauds the MHSAA on these efforts, the fact that the MHSAA may have been or continues to be pro-active in promoting gender equity in some areas of interscholastic sports in Michigan is not relevant to the fact that the MHSAA has acted contrary to law requiring gender equity in the particular situation before this Court. Frankly, conducting an unbiased examination of the facts and listening to dissenters, instead of merely surveying, would have told the MHSAA a long time ago what this Court is now telling it.

The Court will declare that the MHSAA's current scheduling of high school girls' sports in Michigan violates the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan's Elliott-Larsen Civil Rights Act. The Court will enjoin Defendant MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan. As a result, the Court will retain jurisdiction over this case to order that an appropriate remedy be adopted in a Compliance Plan to be submitted by Defendant MHSAA.

The Court will order that Defendant MHSAA bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year. Defendant MHSAA will be ordered to submit a Compliance Plan consistent with this Opinion by June 24, 2002, detailing

a new schedule for sports seasons that complies with the law.

The parties are reminded that Defendant MHSAA may design the new schedule in a number of different ways, and as long as girls and boys share the advantages and disadvantages of the new seasons equitably, this Court will approve the Compliance Plan. For example, Defendant MHSAA is not required to combine seasons of girls' teams and boys' teams in any particular sport, but any remaining single-sex seasons must as a group advantage and disadvantage girls and boys equally. In addition, nothing prevents Defendant MHSAA from utilizing various other scheduling mechanisms designed to treat males and females alike, such as putting freshman and/or junior varsity teams of both sexes into the disadvantageous season while putting varsity teams of both sexes into the advantageous season.

After Defendant MHSAA submits its Compliance Plan proposing how it will reschedule interscholastic sports seasons to comply with applicable law, Plaintiffs and the United States will be given the opportunity to respond to the MHSAA's proposed Compliance Plan. Plaintiffs and the United States will be ordered to respond to Defendant MHSAA's Compliance Plan by July 15, 2002 or within fourteen days of service of the plan on Plaintiffs and the United States, whichever is earlier.

At that time, the Court will decide whether the Compliance Plan of new seasons scheduling complies with the applicable law and is an appropriate remedy. The Court will also order briefing from the parties on the issue of whether Plaintiffs are entitled, under 42 U.S.C. § 1988, to payment of their attorneys' fees by Defendant MHSAA and the appropriate amount. Finally, the Court will approve the partial settlement reached by Plaintiffs and Defendant MHSAA on other issues originally part of this litigation and will enter the Consent Decree at the same time as this Opinion.

No. 02-1127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, ON BEHALF OF ITSELF, ITS MEMBERS, AND ALL THOSE SIMILARLY SITUATED, ET AL.,
Plaintiffs-Appellees,

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., ON BEHALF OF ITSELF AND ITS MEMBERS, Defendants-Appellant.

[FILED]
[NOV 09 2004]
[LEONARD GREEN, CLERK]

ORDER

BEFORE: KENNEDY and GILMAN, Circuit Judges; and SHADUR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Milton I Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

(5)

No. 04-1021

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit properly affirmed the district court's detailed, factual determination that the Michigan High School Athletic Association's scheduling of girls' sports only in disadvantageous seasons violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(2) Whether Plaintiffs' equal protection claim is subsumed by their claim under Title IX of the Education Amendments of 1972, even though this claim was never pressed by MHSAA or decided below, and in fact, MHSAA consistently argued below that it was not subject to Title IX.

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INTRODUCTION

This case concerns the application of well-settled equal protection doctrine to a distinctive factual scenario: the disparate scheduling of girls' sports seasons by the Michigan High School Athletic Association ("MHSAA"). The district court and the Sixth Circuit both held that MHSAA violated the Fourteenth Amendment's Equal Protection Clause by scheduling girls' sports, but not boys' sports, in nontraditional or disadvantageous seasons, without sufficient justification for the differential treatment. The Sixth Circuit's decision is entirely consistent with this Court's precedents and conflicts with no decisions from other circuits. This case thus presents a routine application of this Court's legal standard to record facts that are unique and unlikely to recur, and this Court's review is unwarranted.

MHSAA works hard to fashion issues of law suitable for review, but none exists. First, MHSAA urges the Court to decide whether Title IX provides the exclusive remedy for Plaintiffs' claims. But this claim was never pressed or decided below, and is in fact inconsistent with MHSAA's arguments below that it is not subject to Title IX; thus it cannot be raised for the first time in this Court. As if these were not sufficient grounds for denying review, the district court also found both Title IX and state law violations. As a result, this Court's consideration of the exclusivity issue would not be dispositive. Finally, Title IX is not, in any event, the exclusive remedy here.

Second, MHSAA claims that the case conflicts with this Court's decisions and those of other circuits addressing sex discrimination claims under the Constitution. In fact, this case presents no such conflicts. In its attempts to suggest otherwise, MHSAA mischaracterizes this Court's decision in *United States v. Virginia* [hereinafter *VMI*] and claims that its actions do not constitute facial gender classifications. But MHSAA's argument defies belief, given that the association explicitly

schedules girls' seasons differently from boys' seasons. In any event, the court below correctly applied *VMI* to these facial classifications, holding that *unequal* single-sex programs like the disparate scheduling in this case are unconstitutional. Thus, the Sixth Circuit's decision in no way conflicts with the decisions of this Court or those of other courts of appeals.

STATEMENT OF THE CASE

> *"Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys' program."*

This statement, made by MHSAA's executive director, captures the essence of this case—the association's discriminatory scheduling of girls' high school sports seasons in the state. Pet. App. 34a.

Since the 1920s, MHSAA has supervised and controlled interscholastic athletics in Michigan. In this role, it regulates almost every aspect of sports in the state, including the area most pertinent to this case—the season in which each sport will be played. Pet. App. 28a-34a. When MHSAA began to sanction and regulate sports for girls in the 1970s, it followed the above "boys-first" philosophy and scheduled the girls' seasons in the months when boys were not playing. This philosophy also extended to sports that were contemporaneously sanctioned for boys and girls, such as soccer. As a result, MHSAA now schedules the seasons for all twelve boys' sports it sanctions during the traditional or most advantageous times of the year, while it schedules six girls' sports during nontraditional or disadvantageous times that are harmful to girls. Specifically, while MHSAA schedules boys' basketball in the traditional, advantageous winter season along with every other state and college in the nation, it schedules

girls' basketball in the fall season. It schedules boys' soccer in the traditional fall season, but girls' soccer in the spring. It schedules boys' tennis in the traditional spring season, but girls' tennis in the fall. It schedules boys' swimming in the traditional winter season, but girls' swimming in the fall. It schedules boys' golf in the fall, but girls' golf in the spring.[1] And it is the only state athletic association in the nation that schedules girls' volleyball in the winter instead of the traditional fall season. Pet. App. 34a-39a.

MHSAA was aware that its "boys-first" scheduling negatively affected girls' participation opportunities and that it could be held legally liable for this discriminatory treatment. Indeed, in the early 1990s, MHSAA studied changes to its scheduling of seasons "mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon." However, it made no such changes. Pet. App. 38a.

Plaintiffs Communities for Equity (an organization founded by parents and students to promote gender equity in athletics) and individual parents on behalf of their daughters sued MHSAA in 1998. They alleged that MHSAA discriminates against girls in several ways, including the scheduling of sports seasons, in violation of (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (as enforced through 42 U.S.C. § 1983); (2) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.);

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[1] While MHSAA previously scheduled boys' golf in the traditional spring season, it moved the boys to the fall season in the 1970s because it is easier to obtain tee times and better courses in the fall. When MHSAA began sanctioning girls' golf, it set spring as their season, having previously determined that it was less advantageous. Pet. App. 64a.

and (3) the Elliott-Larsen Civil Rights Act of Michigan state law (M.C.L.A. § 37.2301 et seq.). Before trial, the parties settled all claims except the one involving seasons.

After trial, in which the United States participated as litigating amicus in support of the Plaintiffs, the district court in December 2001 ruled in favor of Plaintiffs on all three claims. The district court's ruling spans almost 100 pages, over 30 of which detail findings of fact about the multiple and significant harms girls suffer as a result of MHSAA's discriminatory scheduling of seasons. Pet. App. 20a-118a. A sample of some of the most harmful findings shows that Michigan girls: (1) lose opportunities to be recruited by college coaches and receive athletic scholarships; (2) lose opportunities to participate in Olympic Development Programs and national club sport programs (e.g., female volleyball players lose 16-20 months of club playing time over a four-year career); (3) have shorter seasons in some girls' sports by as much as 21 days (resulting in less practice time, skill development, and coaching); (4) lose opportunities to participate in special events like March Madness and fall blue-chip basketball shoot-outs; (5) miss out on national publicity, rankings, and All-American honors; (6) lack contemporaneous college and professional role models; (7) cannot compete against teams in neighboring states, which could lessen travel burdens; and (8) endure psychological harm from being treated like "second-class" citizens, resulting in low self-esteem and low life expectations. Pet. App. 39a-77a.

The district court held that MHSAA's alleged reasons for its scheduling of girls' sports—namely, that surveys of schools and girls showed a preference for the current seasons, and that logistical limitations require separate seasons for the sexes to maximize participation—were not supported by the evidence and did not legally justify the harms girls faced. It therefore

ordered MHSAA to reschedule its sports seasons in compliance with the Constitution, Title IX, and Michigan state law by the 2003-04 school year. The district court did not order MHSAA to combine girls' and boys' seasons in any sport, but stated that if MHSAA chose to keep separate seasons, it had to schedule them such that boys and girls equitably share the benefits and burdens of different seasons. Pet. App. 77a-89a, 97a-118a.

The Sixth Circuit affirmed the judgment on the equal protection claim, "thus finding no need to reach the Title IX and state-law issues." After holding MHSAA to be a state actor under this Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 51 U.S. 288 (2001), the court wholly adopted the district court's factual findings, stating that the district court "painstakingly discussed each sport at issue and analyzed why play in the non-traditional season harmed female athletes." Next, applying this Court's intermediate scrutiny standard consistent with *VMI*, the Sixth Circuit examined and rejected MHSAA's main argument that separate seasons maximize athletic participation: "The evidence offered by MHSAA . . . does not establish that separate seasons for boys and girls—*let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons*—maximizes opportunities for participation. . . . [A] large . . . participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives." Thus, the court held MHSAA had not provided an "exceedingly persuasive" justification for its discrimination. Pet. App. 2a-16a. (emphasis added).

REASONS FOR DENYING THE WRIT

MHSAA's petition raises two issues: (1) whether the Sixth

Circuit properly followed this Court's equal protection analysis, and (2) whether Title IX subsumes Plaintiffs' § 1983 claim. Plaintiffs address these issues in the reverse order because, as a matter of logic, the question of whether a court can even consider the § 1983 claim precedes the question of the appropriate standard of proof for that claim.

I. MHSAA FAILED TO RAISE, AND THE COURTS BELOW DID NOT ADDRESS, WHETHER TITLE IX IS THE EXCLUSIVE REMEDY FOR PLAINTIFFS' INJURIES, AND THIS COURT SHOULD NOT DO SO IN THIS CASE.

A. This Court Should Not Review the Question of Whether Title IX Is the Exclusive Remedy for Plaintiffs' Claims Because It Was Not Pressed or Passed On by the Courts Below.

This Court has consistently stated that it "will not review a question not pressed *or* passed on by the courts below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis in original); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 585 (2004) ("We . . . do not decide in the first instance issues not decided below."); *Grupo Mexicano v. Alliance Bond Fund*, 527 U.S. 308, 319 n.3 (1999) ("Because this argument was neither raised nor considered below, we decline to consider it.").

During nearly seven years of litigation, MHSAA never mentioned, let alone pressed, the question of whether Title IX provides the exclusive remedy for Plaintiffs' claims, and the courts below never passed on the issue. Indeed, MHSAA's petition to this Court is the first place that even a whisper of this argument has arisen, despite MHSAA's numerous dispositive motions and its 2000 petition to this Court seeking

interlocutory review of a denial of summary judgment.[2]

The reason for this omission is simple: MHSAA has consistently asserted in the courts below that it is not covered by, and thus does not have to comply with, Title IX. MHSAA should not now be allowed to claim that Title IX is Plaintiffs' only remedy when it repeatedly argued that it was not subject to Title IX in the face of multiple rulings by the district court and Sixth Circuit to the contrary. Rather, these circumstances further demonstrate why this Court should decline to review the exclusivity question. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time in the petition for certiorari and on which petitioner took a contrary position below); *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (noting general rule that it is not proper to allow petitioner to press an argument that he

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[2] MHSAA defends its failure to raise this issue below by claiming that (1) this Court has jurisdiction to review issues not addressed by the lower court when it would have been futile for petitioner to argue the issue, and (2) the Sixth Circuit necessarily passed on the issue since it addressed the merits of the equal protection claim. Both arguments fail. The two cases MHSAA cites for support of its first point are distinguishable because they involved special circumstances where the Court held petitioners did not waive their privilege against self-incrimination by not raising it earlier because the applicable case law had changed such that asserting the privilege in the cases at hand would reverse petitioners' convictions. *See Grosso v. United States*, 390 U.S. 62, 70-71 (1968); *Leary v. United States*, 395 U.S. 6, 27-29 (1969). No such special circumstances exist here. MHSAA's reliance on *United States v. Williams*, 504 U.S. at 43, for its second point is also misplaced. In that case, the Court essentially considered an issue to have been raised because the petitioner contested it in a case relied on by the lower courts to rule against it and did not concede the correctness of that decision in the current case. Here, MHSAA never raised the exclusivity issue. Moreover, the Court in *Williams* held that it could review the "critical issue" not raised by petitioner because it was expressly decided by the court below. By contrast, the exclusivity issue MHSAA presses in its petition for the first time was never decided by the courts below.

disavowed below unless it was merely a new argument in support of his consistent claim or the argument was addressed by court below).

B. This Case Is a Poor Vehicle to Address MHSAA's Exclusivity Argument Because Two Alternative Grounds Support the Decisions of the Courts Below.

This Court has established that when the course of litigation does not turn on the answer to the question presented, certiorari should be denied. *See Smith v. Butler*, 366 U.S. 161 (1961). Moreover, where alternative grounds exist that support the same outcome regardless of the Court's decision on the question presented, this Court has declined review. *See The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."); *see also Belcher v. Stengel*, 429 U.S. 118 (1976) (same).

Deciding the exclusivity question presented by MHSAA would not determine the course of litigation here because, in addition to holding that MHSAA violated the Equal Protection Clause, the district court held that MHSAA violated both Title IX and Michigan state law.[3] The Sixth Circuit found it unnecessary to reach these alternative grounds, thereby leaving in place the district court's rulings for the Plaintiffs on these

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[3] Moreover, this Court normally defers to the construction of a state statute given it by the lower courts. *See Brockett v. Spokane Arcades*, Inc., 472 U.S. 491, 499 (1985); *Butner v. United States*, 440 U.S. 48, 57-58 (1979) (Court refused to address state law claim because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues"); *Bishop v. Wood*, 426 U.S. 341, 346 n. 10 (1976) (Court is hesitant to overrule decisions by federal courts skilled in the law of particular states).

bases. This case is thus a very poor vehicle to address MHSAA's question of whether Title IX is Plaintiffs' exclusive remedy.

C. Title IX Does Not Provide the Exclusive Remedy for Plaintiffs' Claims.

MHSAA's argument that Title IX subsumes Plaintiffs' § 1983 claim is, in any event, without merit. This Court has made it clear that § 1983 is available as a remedy except in very narrow circumstances, none of which apply to Title IX. Thus, this case presents no conflict with the Court's precedents on this issue.

MHSAA's reliance on *Middlesex County Sewage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981), to argue the contrary is misplaced. In *Sea Clammers*, this Court held that the plaintiff could not avoid the administrative enforcement requirements of federal environmental statutes by using § 1983 to enforce those same statutes. Here, by contrast, Plaintiffs do not use § 1983 as a means to enforce a federal statute (i.e., Title IX), but rather to enforce their separate constitutional rights to equal protection.[4] Thus, *Sea Clammers* is simply inapplicable. *See Lillard v. Shelby County Bd. of Ed.*, 76 F.3d 716 (6th Cir. 1996); *Delgado v. Steggall*, 367 F.3d 668 (7th Cir. 2004); *Crawford v. Davis*, 109 F.3d 1282 (8th Cir. 1997); *Seamons v.*

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[4] MHSAA's citations to *Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418 (1987) and *Blessing v. Freestone*, 520 U.S. 329 (1997), further demonstrate the error of its argument. Those cases are distinguishable because they addressed whether plaintiffs could use § 1983 to enforce federal statutes that did not include express private rights of action and thus required the Court to determine whether Congress intended to create a federal right that was enforceable through § 1983. There is no such issue here, where Plaintiffs use § 1983 to enforce their constitutional rights to equal protection.

Snow, 84 F.3d 1226 (10th Cir. 1996).

Nor does *Smith v. Robinson*, 468 U.S. 992 (1984), in which the Court held that the Education of the Handicapped Act ("EHA") subsumes a § 1983 claim,[5] support MHSAA's position. The *Smith* Court held that the EHA claims subsumed the § 1983 claim only because (1) the EHA's legislative history indicated that it should be the exclusive remedy; (2) the § 1983 claim was "virtually identical" to the EHA claims; and (3) Congress established a comprehensive enforcement scheme for the EHA. Title IX does not meet any of these three requirements. *Lillard*, 76 F.3d at 723.

First, MHSAA cannot point to any legislative history evincing congressional intent to establish Title IX as an exclusive remedy for sex discrimination. *See Blessing v. Freestone*, 520 U.S. 329, 346 (1997) (defendants bear burden of showing congressional intent to preclude § 1983 claim).

Second, Plaintiffs' equal protection claim is not identical to their Title IX claim for many reasons, including: (1) Title IX covers only entities receiving federal funds, while § 1983 covers all state actors whether or not they receive federal funds; (2) Conditions that violate the Constitution may not necessarily violate Title IX. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-733 (1982) (striking down female-only nursing school policy under Equal Protection Clause and noting that Title IX explicitly allows single-sex admissions policies in certain instances); (3) Section 1983 allows recovery against individuals, *see Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), while most courts have held that Title IX does not.

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[5] Congress promptly responded to the ruling by amending the statute to more expressly state that it did not intend the EHA to displace any other remedies. 20 U.S.C. 1415(f)(1985); *see* H.R. Rep. No. 99-296 at 4 (1985).

See, e.g., Lipsett v. Univ. of Puerto Rico, 864 F.2d 188, 190 (1st Cir. 1998) (indicating that damages under Title IX may be available only from educational institutions, not individuals).

Third, Title IX does not have a comprehensive enforcement scheme. This Court held that an implied right of action exists to enforce Title IX specifically because the statute lacks comprehensive administrative enforcement mechanisms. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). While Title IX regulations allow individuals to file complaints with the Office for Civil Rights ("OCR"), 34 C.F.R. § 106.71, the process does not, for example, require OCR to address claims, allow complainants to present evidence or witnesses, or require remedies tailored to complainants. *See id.* at 706 n.41; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (finding private right of action for money damages under Title IX because administrative process would leave complainant "remediless"). Moreover, this Court has consistently held that an administrative process designed to lead to the withdrawal of federal funds is not the kind of comprehensive enforcement scheme required to subsume § 1983 remedies. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990); *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 428 (1979). In addition, because Title IX's cause of action is judicially implied, its remedial scheme may be limited by the judiciary. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Thus, Title IX's remedial framework is not sufficiently comprehensive to warrant § 1983 preclusion under *Smith*. *See, e.g., Lillard.*

The cases cited by MHSAA in support of its position that Title IX subsumes Plaintiffs' § 1983 claim misconstrue *Sea Clammers* and summarily conclude that Title IX subsumes § 1983 remedies without conducting any of the above analysis. They fail to examine the Title IX enforcement scheme or to

address whether that scheme is inconsistent with the enforcement of constitutional rights under § 1983. Hence, there is no conflict to resolve here.

II. THERE IS NO CONFLICT REGARDING THE APPROPRIATE STANDARD FOR ANALYSIS OF THE EQUAL PROTECTION CLAIM, AND THUS THE PETITION SHOULD BE DENIED.

MHSAA's claim that this case creates a conflict about the legal standards for addressing gender-based discrimination is without merit. This Court in *VMI* articulated the standard for scrutiny of claims like those at issue here, and the Sixth Circuit in this case adhered to that standard. MHSAA's real argument is that the court below incorrectly applied established law to the facts at issue, and MHSAA makes this argument only by ignoring or disputing the analysis and the facts found by the courts below. This case, accordingly, does not warrant review.

A. The Sixth Circuit's Intermediate Scrutiny Analysis Does Not Conflict with the Analysis Articulated by This Court in *VMI*.

The Sixth Circuit adhered to this Court's intermediate scrutiny analysis in *VMI* and properly concluded that MHSAA's scheduling of girls' sports only in disadvantageous seasons violates the Equal Protection Clause.

In *VMI*, 518 U.S. 515 (1996), this Court was asked to decide whether Virginia's exclusion of women from the educational opportunities offered by the Virginia Military Institute violated the Equal Protection Clause. In answering this question, the Court reiterated the heightened standard that must be met to justify gender-based classifications:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Id. at 532-33.

The Sixth Circuit strictly adhered to this Court's intermediate scrutiny analysis in holding MHSAA's scheduling of girls' seasons to be unconstitutional. It found that MHSAA treats boys and girls differently in the scheduling of their sports seasons and that this disparate treatment harms girls in numerous ways. The court examined MHSAA's justifications for the disparate scheduling and held that they were not "exceedingly persuasive," ultimately concluding that MHSAA's scheduling of girls' seasons violates the Constitution. Pet. App. 3a-8a, 13a-16a.

B. This Case Presents No Conflict About the Proper Rule of Law that Applies to Gender-Based Classifications.

MHSAA tries to turn its dissatisfaction with the outcome in this case into a conflict about the proper rule of law that applies to gender-based classifications, but there is simply no conflict on this issue. Even more troubling is that in its effort to create a conflict where none exists, MHSAA misstates the relevant facts in this case as well as the applicable law. Plaintiffs address these misstatements below.

1. The Sixth Circuit's Decision Does Not Conflict with This Court's Cases Addressing Sex Discrimination Under the Constitution.

MHSAA's argument that its scheduling of girls' seasons does not constitute a facial gender classification defies belief. Given the single-sex nature of sports teams, MHSAA's scheduling decisions are made entirely on the basis of sex (i.e., the sex of the athletes determines in which seasons they play).[6] The Sixth Circuit's decision on this issue thus accords with this Court's treatment of gender-based classifications. Indeed, it is hard to imagine a clearer facial classification. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) ("The policy [at issue] excludes women with childbearing capacity from lead-exposed jobs, and so creates a facial classification based on gender.").

There is also no conflict between the Sixth Circuit's decision and this Court's cases holding that the Equal Protection Clause reaches only purposeful sex discrimination. Because MHSAA's scheduling of girls' seasons is a facial gender classification, Plaintiffs were not required to show any intent to harm female athletes, discriminatory animus, malice or

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[6] MHSAA does not seek to invalidate the separation of sports teams by sex. Indeed, separate sex sports teams have been held constitutionally permissible in the unique context of athletics. *See, e.g., Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987) (noting that separate men's and women's teams are permissible because they "expand substantially the opportunity for women to participate" and that "courts have repeatedly observed . . . that separate and equal athletic programs are constitutionally permissible") (citing several cases); *see also O'Connor v. Board of Education*, 449 U.S. 1301 (1980) (Petition to J. Stevens, Circuit Justice for the Seventh Circuit, to vacate stay) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete . . . .").

any other evidence of motive, whether benevolent or invidious. Rather, Plaintiffs had only to show that MHSAA intended to treat girls differently than boys in scheduling their sports seasons. *See, e.g., Pederson v. Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) ("[The university] need not have intended to violate Title IX, but need only have intended to treat women differently."); *see also Johnson Controls*, 499 U.S. at 199 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates . . . ."). This intent is established simply by the disparate scheduling of girls' sports seasons. *See, e.g., Haffer*, 678 F. Supp. at 527.

The cases MHSAA cites to argue that Plaintiffs should have been required to show discriminatory animus are inapplicable because they are *disparate impact* cases—i.e., cases involving a facially neutral rule with a disparate impact on the basis of sex. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983) (indicating that "intentional discrimination" is synonymous with "disparate treatment" discrimination, which contrasts with "disparate impact" discrimination). In such cases, the Constitution requires a showing of animus to determine "whether the adverse effect reflects invidious gender-based discrimination." *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979) (describing statute at issue as being facially neutral and having a disparate impact on women); *see also Shaw v. Reno*, 509 U.S. 630, 649 (1993) (describing reapportionment legislation as race-neutral on its face).[7]

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[7] MHSAA also cites *Geduldig v. Aiello*, 417 U.S. 484 (1974), to support its argument that its scheduling of girls' seasons is not a facial classification. Plaintiffs believe that case was wrongly decided, and many courts have questioned whether its analysis is still valid in light of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e (k) (2000). *See, e.g., Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). In any event, *Geduldig* is readily distinguishable because MHSAA's scheduling

MHSAA's claim that the Sixth Circuit's decision here conflicts with this Court's decision in *VMI* must also be rejected. While MHSAA mischaracterizes *VMI* as deciding that separate but equal programs for males and females can satisfy intermediate scrutiny,[8] there can be no dispute about one conclusion the Court reached: separate and *unequal* programs for females are unconstitutional.[9] *See VMI*, 518 U.S. at 553 (rejecting alternative program for women established by state because it was a "pale shadow" of VMI). Because MHSAA's scheduling of girls' seasons is manifestly unequal to its scheduling of boys' seasons for the multiple reasons found by the courts below, the Sixth Circuit correctly held that MHSAA's scheduling is unconstitutional, and its decision in no

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decisions explicitly and on their face divide athletes into two groups—one exclusively female and the other exclusively male.

[8] In fact, the Court did not address the argument that the Constitution permits "separate but equal" educational programming for male and female students. *VMI*, 518 U.S. at 533 n.7. Noting, but not deciding, this question in evaluating Virginia's proposed remedy, the Court found instead that the Virginia Women's Institute for Leadership (VWIL)—the program established by the state as an alternative to admitting women to VMI—was manifestly *unequal* to VMI in both tangible and intangible benefits. *Id.* at 534, 547, 551, 557.

[9] The analysis in athletics cases focuses on whether males and females have been provided with equal participation opportunities, benefits, and services. *See Haffer*, 678 F. Supp. At 525 ("This court's task is to . . . determine whether defendants offer equivalent athletic programs to men and women.") *cf. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979) (describing multiple components involved in assessing Title IX compliance, one of which is scheduling, and stating that "Institutions will be in compliance if the *compared program components* are equivalent . . . .") (emphasis added).

way conflicts with *VMI*.

MHSAA also erroneously claims that the Sixth Circuit deviated from *VMI* by requiring identical, rather than equal, treatment of boys and girls. *See* Pet. 13. But neither the district court nor the Sixth Circuit in this case even suggested that MHSAA must schedule girls' sports in seasons that mirror the boys' seasons. To the contrary, the district court repeatedly stated that MHSAA could schedule girls' and boys' sports in separate seasons as long as the sexes "split advantageous and disadvantageous sports equally." Pet. App. 77a.

MHSAA's attempt to create a conflict with *VMI* by resorting to scare tactics is also unavailing. MHSAA erroneously claims that "[t]he Sixth Circuit's holding in this case radically expands the scope of intermediate scrutiny, and in practical terms will render all gender-separate programs untenable." Pet. 17. Specifically, MHSAA avers that the Sixth Circuit "improperly relieved [Plaintiffs] of [its] burdens by treating every decision implementing a program that happens to be single-gender as a facial gender classification, shifting the burden of proof . . . and requiring an exceedingly persuasive justification." Pet. 19. In fact, MHSAA improperly compares its scheduling decisions, which disadvantage female student athletes, to hypothetical examples of differences given the separate teams where there could be no disadvantage—namely, ordering different uniforms for girls' versus boys' teams, assigning girls' and boys' teams different days of the week to use a weight room, and placing the boys' bathroom to the left of a water fountain and the girls' bathroom to its right.

2. The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Courts of Appeals.

There is no conflict between the Sixth Circuit's decision

here and the decisions MHSAA cites of the Third, Fourth, Eighth, and D.C. Circuits. Each of these courts applied this Court's intermediate scrutiny analysis and simply reached different conclusions based on the particular facts before them.

First, there is no conflict between the Sixth Circuit's decision in this case and the Fourth Circuit's decision in *VMI*. In trying to demonstrate such a conflict, MHSAA repeats the same arguments it makes above to try to show a conflict with this Court's decision in *VMI*. Therefore, Plaintiffs reference their responses to MHSAA's arguments in Section B.2 above.

Second, there is no conflict with the Third Circuit's decision in *Vorchheimer v. School Dist.*, 532 F.2d 880 (3rd Cir. 1976), *judgment aff'd*, 430 U.S. 703 (1977), which held that a female high school student was not denied equal protection by being denied admission to an all-male high school when she could attend an allegedly equal girls' high school. *Vorchheimer* was decided before this Court's amplification of the intermediate scrutiny standard in *Mississippi University for Women v. Hogan*, and in any event is distinguishable on its facts. Unlike the separate female school that the Third Circuit held to be equal in that case, MHSAA's scheduling of girls' sports seasons here is clearly unequal, as the courts below consistently held.

Finally, MHSAA alleges conflicts with three decisions by the Eighth and D.C. Circuits involving equal protection claims by female prisoners for discrimination in the provision of educational, employment, and other programs and services. But once again, there is no conflict because all of these cases are distinguishable based on their facts, facts that led the courts to conclude that the female and male inmates were not similarly situated. Thus, the plaintiffs in those cases were held not to have viable equal protection claims. In this case, on the other hand, Plaintiffs are clearly similarly situated to the boys who

participate in sports in Michigan schools. Moreover, the courts in the prison cases held that there would be no equal protection violations even if they assumed the female and male inmates were similarly situated, because the two Eighth Circuit cases involved facially neutral rules with a disparate impact on female inmates with no evidence of discriminatory purpose, while the D.C. Circuit case held that the two programs were equal and rejected female prisoners' claims that they were entitled to the identical programs offered to male prisoners. By contrast, this case involves claims of disparate treatment discrimination, and the courts below found MHSAA's scheduling of girls' and boys' sports seasons to be decidedly unequal. *See Keevan v. Smith*, 100 F.3d 644, 647-51 (8th Cir. 1996); *Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 924-27 (D.C. Cir. 1996); *Klinger v. Department of Corrections*, 31 F.3d 727, 732-34 (8th Cir. 1994).

III. IN LIGHT OF THE DECISIONS BELOW, THE PETITION DOES NOT PRESENT ANY ISSUE OF NATIONAL IMPORTANCE.

Given the decisions below, MHSAA's petition does not present for this Court any issue of national importance. In fact, the only issue presented is the application of the constitutional equal protection analysis to the facts of this case, and those facts are unique and unlikely to recur. Indeed, the underlying substance of the case is no longer of national importance, because, to Plaintiffs' knowledge, MHSAA is the only state high school athletic association in the nation that still schedules girls but not boys in disadvantageous athletic seasons. Most notably, it is the only association that schedules girls' basketball in the fall and girls' volleyball in the winter.

CONCLUSION

For all the reasons stated above, the questions presented by MHSAA are not suitable for this Court's review and the petition for a writ of certiorari should be denied.

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No. 04-1021

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. DIFFERENCES IN THE IMPLEMENTATION OF CONSTITUTIONALLY AUTHORIZED SINGLE-SEX PROGRAMS ARE NOT PRESUMPTIVELY UNCONSTITUTIONAL

1. Respondents completely fail to address the central point made by petitioners, *amici*, and the Third, Fourth, Eighth, and D.C. Circuit decisions cited in the petition: that day-to-day decisions implementing the details of single-sex programs do not themselves classify anyone by gender.

The original choice to have separate teams by gender is a facial classification, and is unquestionably subject to heightened scrutiny. Respondents have never challenged that initial classification, and they concede it is both legal and good policy. Opp. 14 n.6. Once the division is made and teams are separated by gender, the choice of when to schedule the teams to play does not classify anyone by gender at all, but rather as members of individual teams. Respondents argue that "MHSAA's scheduling decisions explicitly and on their face divide athletes into two groups—one exclusively female and the other exclusively male." Opp. 15-16 n.7. But that is plainly wrong: the scheduling decisions do not divide athletes into male and female groups. The division of teams by gender happened thirty years ago and is acknowledged to be legal. The only way to turn a decision scheduling a particular athletic contest into a *facial* gender classification is to conflate it with the initial choice—made decades ago—to have separate teams.

Respondents repeatedly commit that error because it allows them to evade their burden of proof on the central issue in this case: petitioner's intent. It is settled law that the Equal Protection Clause is violated only by intentional discrimination—disadvantages imposed *because of*, not merely *in spite of*, race or gender. Laws that facially divide persons by race or gender trigger heightened scrutiny because "certain classifications . . . in themselves supply a reason to infer antipathy." *Personnel Adm'r v. Feeney*, 442

U.S. 256, 272 (1979). Courts use heightened scrutiny to "'smoke out' illegitimate uses" of race or gender and to ensure that classifications are not the product of prejudice or stereotype. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). But in order to justify that presumption of discriminatory purpose there must be something on the face of a policy or statute demonstrating that the policy or statute *itself* is classifying by race or gender. A statute or policy that does not facially classify anyone by race or gender gives no reason to assume *ab initio* that the action is motivated by discriminatory intent.

This Court discussed a very similar issue in *Shaw v. Reno*, 509 U.S. 630 (1993), where it explained that a districting statute "typically does not classify persons at all; it classifies tracts of land, or addresses." *Id.* at 646. Lines on a map, like dates on a calendar, are facially neutral. Of course a plaintiff is free to prove that the particular line, or date, was chosen *because of* an invidious purpose. And if the particular choice of lines on the map (or dates on the calendar) as a whole is "so bizarre on its face that it is unexplainable on grounds other than race [or gender]," *id.* at 644 (quotation omitted), then that purpose might fairly be presumed. But respondents have never even alleged that MHSAA's tournament schedules violate that standard.

What respondents insist on calling "disparate treatment" by gender is merely a differential *impact* by gender that is inevitable in segregated programs. When teams (or schools, or prisons, or bathrooms) are segregated by gender, then the impact of any decisions implementing the details of those programs will be highly (and perhaps perfectly) correlated with gender. There is simply no other way to do it. Since differences are inevitable, and it is always possible to argue that a difference is better for one side or the other, scheduling decisions will inevitably produce arguable "disadvantages" that are highly correlated with the makeup of the teams—and therefore with gender.

But—and this is the critical point that merits this Court's review—any perceived "disadvantage" associated with a particular scheduling decision is not automatically *because of* (as opposed to *in spite of*) the gender composition of a team. Respondents allege that "MHSAA's scheduling decisions are made entirely on the basis of sex." Opp. 14. But that is not self-evident; it is their burden to prove. MHSAA might well have chosen the post-season tournament schedules it did for non-invidious reasons—such as, first and foremost, to coincide with the season most schools were already conducting their regular season contests. If respondents believe that MHSAA scheduled its girls' volleyball tournaments in winter *because they are composed of girls*, then they have the burden of proving that contention. *See Feeney*, 442 U.S. at 279.

Perhaps the clearest way to illustrate respondents' error is this: if MHSAA had chosen its respective boys' and girls' athletic tournament dates by random lottery, and a plaintiff alleged that the girls' season was "disadvantageous" relative to the boys' season (or vice-versa), respondents (and the Sixth Circuit) would treat the scheduling as a presumptively unconstitutional facial gender classification, and shift the burden to MHSAA to come up with an "exceedingly persuasive justification." Perhaps losing a fair lottery would be an "exceedingly persuasive justification" for what respondents' insist on calling "disparate treatment by gender," or perhaps not. Regardless, that is the wrong way to think about this problem.

The district court and Sixth Circuit wrongly relieved plaintiffs of their burden to prove that any "disadvantage" associated with the challenged scheduling decisions was the product of intentional discrimination, or that the athletic programs for boys and girls were not substantially equal. Respondents forthrightly concede that they "were not required to show any intent to harm female athletes, discriminatory animus, malice or any other evidence of motive, whether benevolent or invidious." Opp. 14-15. The

Sixth Circuit instead treated *any* difference in the implementation of separate teams as presumptively unconstitutional, regardless of the reason for the difference or the impact of that difference on the overall program.

MHSAA is not suggesting that respondents could never succeed on their claims. A "disadvantage" to female athletes produced by particular scheduling decisions could violate the Equal Protection Clause if it resulted from intentional discrimination (i.e., if the schedule was chosen *because of*, not merely *in spite of*, its adverse effect on girls), or if it resulted in athletic programs that were not substantially equal overall. But a difference, standing alone, is not sufficient. The Sixth Circuit's decision guts the burden of proof for plaintiffs challenging gender discrimination in the implementation of separate programs.

2. The Sixth Circuit's holding turns every trivial detail of how men's and women's programs are implemented into a constitutional case, and will have practical consequences that are simply unacceptable. As explained in greater depth by *amici*, administering separate athletic programs requires numerous decisions every day that create "disadvantages" for one team or another, but for which there simply can be no "exceedingly persuasive" justification.

For example, the Basketball Coaches Association of Michigan notes that a rural school with only one experienced coach has two choices: it can schedule boys' and girls' teams to play at the same time, thereby ensuring that one team will not have a qualified coach, or it can schedule teams to play in different seasons so that they can both share the coach. Under respondent's theory, *both* choices are presumptively unconstitutional, because either alternating seasons or assigning the experienced coach to one team implies a "facial classification" by gender. That cannot be the law. While decisions like these *might* be unconstitutional (if, for example, the school gave the boys the experienced coach *because they are boys*), subjecting them to intermediate scrutiny is absurd.

Respondents try to downplay the radical nature of the Sixth Circuit's holding by suggesting (Opp. 17) that differences are not necessarily *disadvantages*. That distinction is entirely in the eye of the beholder. Any difference will have consequences that a particular plaintiff might find disadvantageous. For example, scheduling practice times in a shared gymnasium, or assigning referees to officiate games will inevitably lead to minor differences that someone will deem disadvantageous. *See* Br. of Mich. Ass'n of School Boards at 5-6. But there will never be an "exceedingly persuasive" justification for assigning a referee to any particular game. This litigation has focused on alleged "disadvantages" as subjective as the weather—is it better to start in warm weather and end in cold, or vice-versa—and came to opposite conclusions for golf and tennis. The district court concluded it was "advantageous" to play golf on less crowded courses even if there are not enough daylight hours to play 18 holes—as opposed to playing full rounds on more crowded courses. Perhaps a lawsuit complaining that the girls' bathroom was placed to the left of the fountain instead of the right is far-fetched; but the fact that such a claim would state a constitutional case sufficient to shift the burden of proof should suffice to show that the Sixth Circuit's analysis is flawed.

Because "the parade of potential discrepancies between the various male and female programs is endless," the scope of litigation is endless as well. Br. of Mich. Interscholastic Athletic Adm'rs Ass'n at 8. If schools are required to supply an "exceedingly persuasive justification" for every individual difference, then every decision will have constitutional ramifications. The ensuing litigation, or even the threat of litigation, will for all practical purposes make separate facilities unconstitutional.

3. Respondents did not allege, and the Sixth Circuit did not hold, that the overall athletic opportunities were not substantially equal for boys and girls. Respondents concede that the appropriate inquiry is into the *overall* athletic

programs. Opp. 16 n.9 (quoting *Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987) ("This court's task is to . . . determine whether defendants offer equivalent athletic programs to men and women.")). The district court's finding that girls received "all of the disadvantageous playing seasons" among the six sports respondents chose to focus on, Pet. App. 98a, is not equivalent to a finding that the overall athletic offerings were not substantially comparable.

Respondents misunderstand this Court's holding in *United States v. Virginia*, 518 U.S. 515 (1996). It held that separate military institutions for men and women were unconstitutional because the state did not demonstrate "substantial equality" in the "educational opportunities" for men and women. *Id.* at 554. This Court determined that VWIL's *program as a whole* was a "pale shadow" of VMI's after examining such wide-ranging educational considerations as "the student body, faculty, course offerings, and facilities" as well as "funding, prestige, alumni support, and influence." *Id.* at 552-53. This Court *did not* hold that every detail had to be identical or independently supported by an "exceedingly persuasive justification."

Respondents have never made any effort to articulate a meaningful conception of what "substantial equality" means for the overall athletic programs. As MHSAA and various *amici* have emphasized, interscholastic athletic programs are designed "to enhance the educational experiences" for *all* high school athletes, and to "promote participation and sportsmanship . . . and to maximize the achievement of educational goals." Brief of *amicus curiae* Nat'l Fed'n of State High School Ass'ns at 2. Respondents flatly assert that the seasons selected for girls are "manifestly unequal" to those of boys. Opp. 16. But without analysis of how the alleged differences relate to the overall athletic programs, respondents are essentially arguing that VWIL could have been unconstitutional merely because its cafeteria served fish sticks on Fridays, if a court were convinced that fish sticks are "manifestly unequal" to the pizza served at VMI.

Respondents have presented no evidence that the disadvantages they have identified have any substantial impact on the overall athletic offerings. To the contrary, MHSAA reasonably maintains that its scheduling choices create tangibly *better* athletic opportunities for both girls and boys. And indeed, most of respondents' complaints have nothing whatsoever to do with the core educational goals of the interscholastic athletic programs. MHSAA has never considered Nike's schedule to be relevant to its attempts to maximize participation and the use of scarce facilities.

4. Respondents try unsuccessfully to distinguish away the conflict between the Sixth Circuit and the Third, Fourth, Eighth and D.C. Circuits. There is a square conflict.

The Sixth Circuit's decision conflicts with the Fourth Circuit's holding in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), for the same reason (discussed above) that it is inconsistent with this Court's reasoning in that same case.

In *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976), the Third Circuit upheld separate schools for boys and girls even though the system operated to the disadvantage of girls in some respects. Respondents suggest, superficially, that the Third Circuit held that the schools were "equal." Opp. 18. In fact it held that the "education available to the female students . . . is comparable" overall, although the science offerings at the boys' school were "superior." 532 F.2d at 882. The Third Circuit did not hold that that difference must independently satisfy intermediate scrutiny (which it did apply, *see id.* at 888).

Respondents attempt to distinguish the Eighth and D.C. Circuit prison cases, but they are directly on point. The plaintiffs in those cases argued that the education and employment offerings in women's prisons were different from the similar offerings at men's prisons, in ways that were disadvantageous to women. The Eighth and D.C. Circuits squarely held that, although there were disadvantages, the differences were not facial classifications and the plaintiffs must prove discriminatory intent. As the

Eighth Circuit put it, even though male and female inmates are segregated into separate prisons, "there is simply no . . . statute or policy that distinguishes on its face between men and women as to prison programs. . . Determining whether the plaintiffs receive inferior programs because of their sex . . . requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions." *Klinger v. Dept. of Corrections*, 31 F.3d 727, 734 (8th Cir. 1994).

II. TITLE IX PREEMPTS THE § 1983 CLAIM

1. Respondents concede that there is a direct, acknowledged circuit split over whether Title IX preempts § 1983 claims under the *Sea Clammers* doctrine. Respondents do not contest the importance of that conflict. Instead, they argue that this Court should not address the issue because it was not argued below.

Petitioner did not press the issue below because the Sixth Circuit had previously held that Title IX does not preclude claims brought under § 1983, and raising the issue would have been futile. Petitioner recognizes that the posture of the preclusion issue is unconventional. If this Court believes that posture makes review inadvisable, petitioner respectfully suggests that the Court grant review only of the equal protection issues. But this Court is not barred from considering the issue if it chooses to, and there are strong prudential reasons for granting review.

Although this Court normally does not consider issues not presented below, it has repeatedly held that it has that power. *E.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976). In *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), this Court addressed an issue raised in the petition but not below, reasoning that "the interests of judicial administration will be served by addressing the issue on its merits."

The question of whether Title IX precludes § 1983 claims is an important issue that is dividing the lower courts. Congress's enactment of Title IX reflects its judgment that promoting gender equity in education is best achieved by

creating incentives for educational institutions to work with the Department of Education (DOE) to establish policies that will eliminate discrimination. Title IX's incentive system, its focus on educational institutions (not individual officers), its comprehensive administrative regime, and its enforceability by private plaintiffs make it clear that Congress intended Title IX to supersede equal protection claims brought pursuant to § 1983. *See Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984) (comprehensive nature of Education of the Handicapped Act and carefully tailored administrative regime demonstrate Congress' intent to bar equal protection claims brought under § 1983).

The *Sea Clammers* issue is squarely presented here because the Sixth Circuit relied solely on the § 1983 claim to support its judgment. If this Court grants review, the issue will be the subject of full briefing, and it has already been thoroughly addressed in seven court of appeals opinions. Furthermore, this is a pure question of law for which no augmentation of the record is necessary. In sum, any prudential reasons against addressing the issue are minimal.

2. Respondents note that MHSAA argued in the district court that it was not subject to Title IX. Petitioner did have an argument that Title IX does not apply to it, but that argument was soundly rejected by the district court. If this Court grants review of the *Sea Clammers* issue, petitioner waives any argument that Title IX does not apply to it for purposes of this case. Therefore, there is nothing interfering with this Court's consideration of the issue.

The fact that respondents might ultimately win under Title IX also is not a vehicle problem. If petitioner prevails on the *Sea Clammers* issue, this Court would remand for consideration of the Title IX claim on the merits.[1]

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[1] Respondents' reliance on the state law claim as an alternate ground for affirmance, Opp. 8, does not obviate the need for review. The state law claim is not an independent ground for decision because Michigan's civil rights law is coextensive with the Equal Protection Clause. Pet. App. 110a-116a. If this Court concludes that Title IX precludes § 1983

Petitioner has strong arguments under Title IX that the court of appeals did not address because it wrongly believed it could resolve the case on Equal Protection grounds.

The DOE has made it quite clear it does not believe that Title IX commands precisely identical treatment in order to establish meaningful equality. For example, in its most recent "Additional Clarification of Intercollegiate Athletics Policy," DOE's Office of Civil Rights increased the flexibility for colleges to satisfy Title IX even without providing identical athletic opportunities for students. *Available at*: http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html. DOE has also proposed a rule permitting single-sex classrooms that would require "substantially equal," but not precisely identical, offerings. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (proposed Mar. 9, 2004) (to be codified at 36 C.F.R. pt. 106). It states that "a single-sex class for each sex, in the same subject, generally is not required," and indeed that "different results for boys and girls, in some instances, may be permissible." *Id.* at 11,279.

The district court's Title IX analysis was deeply flawed, giving short shrift to both the text of the statute and its implementing regulations. Both the statute and the regulations look to substantial equality in the overall athletic opportunities for boys and girls, a consideration that the district court simply did not address.

CONCLUSION

The petition for certiorari should be granted.

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claims, it could still provide guidance on the Equal Protection issue in the course of reversing the district court's interpretation of the (federally dependent) state law. The state claim is fairly included in the question presented. Even if this Court chooses not to reach that claim, the fact that respondents might ultimately prevail on either the state law claim or Title IX on remand does not make the *Sea Clammers* issue less important or squarely presented.

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In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BASKETBALL COACHES ASSOCIATION OF MICHIGAN, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Basketball Coaches Association of Michigan, Inc. respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner Michigan High School Athletic Association. Consent to the filing of this brief has been granted by counsel for Petitioner, and has been lodged with the Clerk of this Court. Respondents have withheld consent, necessitating the filing of this motion.

Founded in 1976, *amicus* is a non-profit corporation organized under the laws of the State of Michigan and committed to the development of student athletes, professionalism in interscholastic athletics, sportsmanship, and the growth of the sport of basketball. *Amicus* submits this brief because every high school basketball coach in the State of Michigan has been and will continue to be directly and substantially impacted by the lower courts' rulings with respect to the scheduling of the boys' and girls' basketball seasons.

Amicus urges this Court to grant certiorari. The District Court and the Sixth Circuit incorrectly concluded that gender-neutral scheduling decisions constituted facial gender classifications subject to intermediate scrutiny. The lower courts' decisions will adversely impact all of the stakeholders in interscholastic athletics, and will subject many basketball coaches to the threat of litigation based on the personal decisions that those coaches may make with respect to which gender-specific team they will coach in the wake of the District Court's order to realign the girls' and boys' basketball seasons.

Because of the unique perspective that basketball coaches have with respect to the scheduling of those seasons, *amicus* believes that the attached brief will aid this

Court in considering the petition. *Amicus* believes that it can add insight as to why it is important for this Court to grant the petition and respectfully requests that this motion to file a brief *amicus curiae* be granted.

Dated: March 31, 2005 Respectfully submitted,

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QUESTION PRESENTED

Amicus will address the following question, which is framed as Question 1 in the petition for a writ of certiorari:[1]

> Whether the Sixth Circuit erred by holding, in conflict with decisions of this Court and the Third, Fourth, Eighth and D.C. Circuits, that differences in the implementation of constitutionally authorized single-sex programs must be characterized as presumptively unconstitutional gender classifications subject to intermediate scrutiny.

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[1] *Amicus* unequivocally supports the Petitioner's second basis for requesting certiorari. *Amicus* believes, however, that the first question presented impacts it and its members more directly and substantially and, accordingly, has elected to confine its presentation to that question alone.

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INTEREST OF AMICUS CURIAE

The Basketball Coaches Association of Michigan, Inc. ("BCAM") respectfully submits this brief *amicus curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States.[2] BCAM is a non-profit corporation organized under the laws of the State of Michigan and committed to the development of student athletes, professionalism in interscholastic athletics, sportsmanship, and the growth of the sport of basketball. BCAM submits this brief because its members, approximately 2,400 middle school and high school basketball coaches throughout the State of Michigan, have been and will continue to be directly and substantially impacted by the lower courts' rulings with respect to the scheduling of the boys' and girls' basketball seasons.

---

[2] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, BCAM states that no counsel for any party authored this brief in whole or in part, and no person or entity other than BCAM and its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Citing this Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*"), the lower courts incorrectly treated gender-neutral scheduling decisions as facial gender classifications and accordingly held that the sports scheduling system served by Petitioner Michigan High School Athletic Association ("MHSAA") denied female athletes equal protection of the laws. However, the lower courts ignored the fact that the challenged scheduling decisions themselves are not based on an athlete's gender, but are based instead on, among other factors, practical, logistical concerns with respect to limited facilities and the interest of maximizing participation in interscholastic athletics for all students. Because both the District Court and the Sixth Circuit concluded that MHSAA's scheduling system constituted a facial gender classification, the Plaintiffs in this case were not required to prove that the scheduling decisions of Michigan school administrators and coaches were motivated by a discriminatory animus or that the athletic programs available to female student-athletes were not substantially equal in the aggregate. In fact, neither the District Court nor the Sixth Circuit analyzed the extent to which, if at all, these scheduling decisions were based on gender. Each analyzed only the disparate effects of the scheduling decisions on the ability of a select few female student-athletes to obtain individual benefits, such as national ranking on All-American lists, media attention and college scholarships, each of which has nothing whatsoever to do with the purpose underlying participation in high school sports. And, by treating any decision between male and female athletic programs as presumptively unconstitutional, the lower courts have created a situation in which every decision made by school administrators, athletic directors, athletic conferences,

coaches and officials that affects single-sex athletic teams could be the subject of equal protection litigation.

Further, playing basketball in the fall is not meaningfully disadvantageous to female student-athletes. To the contrary, evidence adduced at trial established several advantages to the fall basketball season, and the realignment of the basketball seasons as mandated by the District Court and affirmed by the Sixth Circuit will do nothing to create a more advantageous condition for those athletes. BCAM submits that, had the lower courts properly applied this Court's equal protection jurisprudence, such evidence would have been sufficient to withstand Plaintiffs' equal protection challenge.

BCAM submits that the MHSAA's petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

ARGUMENT

At the outset, BCAM notes its firm institutional belief that interscholastic team athletics exist only to supplement the educational experience by instilling in student-athletes an appreciation for, among other things, teamwork, responsibility and personal discipline. BCAM submits that interscholastic athletics do not exist to exult individual achievement or to enhance the ability of any single athlete to obtain personal attention or athletic scholarships. Instead, interscholastic athletics—the vast majority of the participants in which will never play intercollegiate athletics, let alone receive an athletic scholarship—exist to promote the growth and betterment of student-athletes such that they will carry forward into their adult lives the core values instilled in them through athletic competition. Throughout this litigation, BCAM and its member co[illegible]ies have become increasingly concerned with the emphasis placed upon scheduling sports seasons in such a way as to maximize the non-interscholastic athletic opportunities, and ostensible college recruitment advantages, for *individual athletes* as opposed to athletic *teams*. The trial court's focus on the "impact" of Michigan's current athletic scheduling system on female student-athletes' opportunities for individual achievement is anathema to the mission of high school interscholastic sports to maximize participation for all students—boys and girls alike.

Had the trial court correctly imposed upon Plaintiffs the burden of proving that the MHSAA's current scheduling system was either motivated by discriminatory animus or that the subject athletic programs were, overall, not substantially equal, BCAM submits that, based on the evidence that MHSAA presented and which is more fully described in MHSAA's Petition for Writ of Certiorari, MHSAA would have prevailed in the litigation. The

current scheduling system represents the product of historical and careful balancing of the interests of all of the stakeholders in interscholastic athletics—students, student-athletes, parents, coaches, officials, school administrators and even fans—after giving due consideration to the resources necessary and available to sponsor athletic events.

Michigan's current athletic scheduling system may not be perfect, and it may not provide Michigan girls with the mirror-image of the basketball experience that boys or girls in other states are afforded. However, it does satisfy this Court's established standards of equal protection of the laws.

I. The District Court and the Sixth Circuit incorrectly treated gender-neutral scheduling decisions as facial gender classifications, contrary to this Court's precedent and in direct conflict with other Circuit Courts of Appeal.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court's precedents instruct, however, that the Equal Protection Clause does not guarantee that every aspect of a service or benefit conferred by the state will be equal in all respects. Rather, equal protection guarantees only an equal opportunity to receive such service or benefit. In the aggregate, the scheduling of girls' high school athletics in Michigan provides girls with equal opportunity and equal access to the benefits derived from participation in such activities, which BCAM submits are the "life-skills" that are honed in part through athletic competition—teamwork, cooperation, and personal discipline and responsibility.

The District Court and the Sixth Circuit did not address the question of whether Michigan's current athletic scheduling system denies Michigan girls these fundamental benefits of interscholastic competition. Instead, each focused only on whether the scheduling system denied girls the opportunity to receive certain individual benefits that are totally unrelated to the benefit that MHSAA and its member schools provide, which is the opportunity to participate in school sports. Both the District Court and the Sixth Circuit ultimately concluded that the scheduling system was facially discriminatory because of the impact that it has on certain individuals' ability to receive those personal benefits.

In *VMI*, this Court found that the Virginia Military Institute's all-male admissions policy denied women the opportunity to obtain the "unique educational benefit" that VMI offered to males. *VMI*, 518 U.S. at 540. VMI's all-male admissions policy was undeniably facially discriminatory; men were admitted to a one-of-a-kind military college, and women were not. Women were denied the opportunity to receive the benefit of an educational model that was "not available anywhere else in Virginia." *VMI*, 518 U.S. at 520. The Court also determined that Virginia's proposed "parallel" program, the Virginia Women's Institute for Leadership ("VWIL"), was different in, most notably, its educational and degree offerings. *VMI*, 518 U.S. at 526. VWIL did not even offer courses, let alone degrees, in engineering or advanced math and physics courses. This Court further found that the military training offered by VWIL employed an altogether different educational method than VMI–cooperative as opposed to adversative—and offered no opportunity for women to experience the unique and rigorous military training which *only* VMI could offer. *VMI*, 518 U.S. at 548.

Simply put, VMI's admissions policy denied women the essential benefits that it provided to men, and therefore denied them equal protection of the laws.

By contrast, the scheduling of a sports season is not facially discriminatory. As is set forth below, the decision to have separate teams for boys and girls in the first instance inevitably leads to the result that the players on those teams will be treated differently. However, the fact remains that boys and girls alike have the equal opportunity to receive the essential benefit of interscholastic competition—specifically, the opportunity to participate in team sports and carry forward the core values of such competition into their adult lives. The opportunity to receive these benefits is wholly unaffected by the specific period of time during a calendar year in which the sport is played. However, without any regard to the purpose underlying interscholastic athletic competition, the Sixth Circuit, relying on *VMI*, affirmed the District Court's finding that Michigan's current sports scheduling system was facially discriminatory. Neither court, however, found, as this Court found in *VMI*, that the scheduling of girls' athletic seasons denies them the essential benefits of interscholastic competition, and Plaintiffs do not even assert that it does. Rather, Plaintiffs cite, and the District Court and Sixth Circuit focused solely upon, the allegedly "disadvantageous" impact of athletic participation at certain times during a calendar year, rather than athletic participation in the first instance, for the proposition that Michigan's sports scheduling system denies them equal protection. Interscholastic athletics do not exist to provide any individual athlete—male or female—with special "perks" or attention, publicity, individual awards or college scholarships, all of which are nothing more than byproducts of the interscholastic athletic experience.

Because the District Court and Sixth Circuit found that Michigan's current sports scheduling system was facially discriminatory, Plaintiffs were not required to prove that such system was driven by gender animus. However, because this case presents only an issue of disparate impact, this Court's precedent requires that Plaintiffs prove precisely that. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), this Court addressed a challenge to the Massachusetts veterans preference statute, which required that veterans who qualified for state civil service positions be considered for appointment before non-veterans. The lower court had granted injunctive relief in favor of the plaintiffs because it found that the "absolute preference afforded...to veterans has a devastating impact upon the employment opportunities to women." *Feeney*, 442 U.S. at 260. The lower court had also found that the hiring preference was "nonneutral" because of the impact that it had on women, e.g., that because women had traditionally not served in the armed forces, they were excluded from the class of veterans that would receive the preference. This Court reversed, recognizing, among other things, that "the equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Feeney*, 442 U.S. at 271; *citing Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). This Court further recognized that "[w]hen the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Feeney*, 442 U.S. at 271; *citing New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979). And, where a neutral law has a "disproportionately adverse effect...it is unconstitutional *only if that impact can be traced to a discriminatory purpose*." *Feeney*, 442 U.S. at 272 (emphasis supplied);

citing Washington v. Davis, 426 U.S. 229 (1976) (holding that disproportionate impact, standing alone, does not constitute unconstitutional discrimination). This is precisely the standard to which Plaintiffs in this case should have been held but were not.

The classification of boys and girls into separate teams is rationally based. In fact, the legitimacy of such classifications, specifically with respect to the sport of basketball, has long been recognized by this Court. In *O'Connor v. Board of Education of School District 23*, 449 U.S. 1301 (1980), Justice Stevens, sitting as a Circuit Justice, held that:

> It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events.

O'Connor, 449 U.S. at 1307; *see also Cape v. Tennessee Secondary Schools Athletic Association*, 563 F.2d 793 (6th Cir. 1977) (finding that without gender-separated teams, girls effectively could not participate in athletics). The scheduling of athletic competition within the framework of gender-specific teams works nothing more than a purportedly uneven effect within the gender-based classification. Because scheduling decisions themselves have nothing to do with an athlete's gender, the inquiry into the constitutionality of such scheduling decisions must necessarily begin with an inquiry into the existence of a discriminatory purpose underlying such decisions. The District Court and the Sixth Circuit failed to so inquire.

Once a decision is made to have gender-separate teams, it must be acknowledged that school personnel must have the flexibility within the confines of the Equal Protection Clause to decide to sponsor the same sports in different seasons to maximize the availability to all students—boys and girls alike—of limited facilities.[3] MHSAA's member schools have not chosen these particular schedules because of gender, but rather because of coaching and facilities shortages, a desire to increase the overall participation and profile of girls' athletics, and other practical problems incidental to the only real gender classification at work in this case: the decision to have separate teams. Standing alone, therefore, the decision to have separate seasons cannot be said to constitute discrimination under the Equal Protection Clause, notwithstanding any perceived or alleged disparate impact upon a particular gender. *Feeney*, 442 U.S. at 279.

The lower courts' ruling ignores the fact that, because school districts in the State of Michigan maintain separate teams for boys and girls, certain aspects of the athletic experience will necessarily be different. The lower courts' rulings further offer no guidance on what differences would pass constitutional muster and what would not. If the lower courts' application of the law is correct, school administrators and athletic directors, and likely coaches themselves, will be exposed to potential equal protection claims under the Court-ordered realignment plan, simply by virtue of having to choose which team a particular coach will coach, or which game a particular referee will

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[3] In fact, the District Court correctly recognized that "[e]nsuring the greatest number of participation opportunities for children in interscholastic sports is a legally legitimate goal, as well as wise policy." *Communities for Equity, et al. v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805 (W.D.Mich. 2001) ("CFE").

officiate. The following hypothetical situations illustrate this concern:

- Over three hundred Michigan basketball coaches presently coach both boys' and girls' teams. These coaches, in close consultation with their school's athletic director, will be forced to choose which gender-based team to coach. Accordingly, half of the athletes that they presently coach will have to adjust to a different coach, who may very likely be less experienced and less qualified than the present coach. If an experienced and accomplished coach opts to coach boys' basketball in the winter, thus causing that coach's former girls' basketball team to thereafter be coached by a less experienced and/or less qualified coach, the school district and the coach have violated 42 U.S.C. § 1983 by denying the female student-athletes equal protection because they no longer have the benefit of that coach's experience and expertise. Further, the school district and the coach would have the burden of proving an "exceedingly persuasive justification" for what is ultimately the coach's personal decision to coach the boys' team rather than the girls' team.
- With simultaneous seasons, the number of basketball games played in any given week will double. While it is possible that a sufficient number of new officials could be trained, it is undeniable they will not have the depth and breadth of officiating experience that the existing officials do. Athletic directors and "assignors" designated by officiating associations and athletic conferences are

> responsible for assigning referees to officiate particular games. If an inexperienced referee is assigned to officiate a girls' basketball game and the game is lost because of an egregious "bad call" made by the inexperienced referee, then the athletic director, the school district that employs her or him, the assignor, the officiating association and the athletic conference that participated in assigning the official to that game have violated 42 U.S.C. § 1983 by denying the student-athletes on the losing team equal protection because those student-athletes have not been afforded the benefit of referees that are sufficiently experienced and qualified.

Reduced to its core, Plaintiffs' equal protection claim is premised upon the expectation that the interscholastic athletic opportunities available to young women should mirror those available to young men. Consistent with this Court's equal protection jurisprudence, Plaintiffs have no legal entitlement to same. And, consistent with practical reality, same is simply impossible.

Finally, Plaintiffs in this case have never proven, or even alleged, that Michigan's athletic offerings to girls and boys are unequal overall. Therefore, since Michigan girls are provided with an equal opportunity to compete, it cannot be said that the current scheduling of sports seasons constitutes a denial of equal protection. *Feeney,* 442 U.S. at 273 (holding that the Fourteenth Amendment guarantees equal opportunities, not equal results). Because Michigan girls' opportunities to participate in interscholastic athletics have not been proven to be "unequal" to those of Michigan boys, it cannot be said that MHSAA has denied the Plaintiffs equal protection.

II. In any event, playing basketball in the fall is not meaningfully disadvantageous to female student-athletes.

Plaintiffs argued, and the District Court found, that girls playing basketball in the fall are disadvantaged because:

- they do not have the opportunity to participate in special events for professional or semi-professional teams, or in national "shoot-outs" such as the Nike and Blue Star shootouts;
- they "do not get to participate in 'March Madness' or the excitement and publicity surrounding this time period;"
- they must play one game a week on Thursday (a school night) to avoid conflicting with football, although that game could be played on Fridays in the winter;
- they are less likely to make the Parade All-American lists that come out in March, because they have been "forgotten;"

CFE, 178 F. Supp. 2d at 818-820. It is significant that the perceived harms described above have nothing to do with the properly understood scope of interscholastic athletic programs. Rather, they represent incidental outcomes that some individual athletes may desire, and in fact receive, from the interscholastic basketball experience, and moving the basketball season to the winter will not put those athletes in a more advantageous position than if they continued to play in the fall.

Teams coached by BCAM members have been invited to play before the Women's National Basketball Association's Detroit Shock professional basketball games

in the late summer and early fall. Further, girls coached by BCAM members have participated in both the Nike and Blue Star shootouts. Playing interscholastic basketball in the fall should not have any effect on their participation, except insofar as it imposes yet another choice for a player and her parents to make with respect to the constant, delicate balance between academics and other social and extracurricular activities.

Further, Michigan girls participate in fall tournament play, colloquially known as "December Dreams." Not only is this tournament experience operationally and functionally identical to the March boys' tournament experience, BCAM submits that moving the girls' season to the fall would actually *limit* the media exposure to the girls' tournament. As the seasons are presently aligned, the sports media—e.g., television, radio, and print media—have more available column space and air time to provide media coverage to the fall girls' tournament. Simply put, the girls' fall tournament does not presently "compete" for media exposure with men's and women's professional basketball, the NCAA men's basketball tournament, and the NCAA women's basketball tournament, which it would if the seasons were re-aligned in accordance with the lower courts' orders. BCAM believes that female high school basketball players would receive less attention as a result, and neither this Court, the Sixth Circuit, the District Court, nor any party to this litigation can compel a newspaper or broadcast station to devote column space or air time to any basketball tournament.

BCAM's belief that girls' basketball players would receive less media attention if that season were held in the spring is not unique. In fact, in *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*, 558 F. Supp. 487 (D.D.C. 1983), the

United States District Court for the District of Columbia quoted one of Plaintiffs' experts in this litigation, Dr. Donna Lopiano, as follows:

> Although our society's sex stereotypical values are changing, there is little question that the average spectator *and the commercial interests catering to his or her desires*, still view strength, aggression and competition as unbecoming to the fairer sex or at the very least, not something to go out of one's way to observe on a regular basis...*Men's athletics is fully developed and very appealing in a commercial sense.* Women's athletics is unrefined, unfinished and in the dark ages by comparison.

Association for Intercollegiate Athletics for Women, 558 F. Supp. at 496 (emphasis supplied). BCAM submits that, while admittedly inequitable, the practical reality of commercial media enterprises is such that girls' high school basketball coverage will take a media-imposed "back seat" to the NBA, WNBA, NCAA men's and women's basketball, and high school boys' basketball if the girls' season is moved to the winter. BCAM further submits that this is not a circumstance or consequence for which any person or entity other than the media outlets and their consumers can be held accountable.

Further, BCAM submits that simply moving girls' basketball to the winter will not alleviate the scheduling conflicts that are inherent in Friday night activities. It is not the mere fact that football games are played on Friday nights that inhibits the feasibility of girls' basketball being played on Friday nights. Rather, each school event, be it a band or orchestra concert, drama production, or athletic contest, requires the presence of school personnel to

operate the infrastructure, be it an auditorium, stadium, or gymnasium. Whether girls' basketball must be scheduled in conjunction with football in the fall or boys' basketball in the winter, the same pressures will be placed on the schools' resources. There is no scheduling "formula" that will alleviate this problem.

Finally, the focus on the likelihood that a player will or will not make the Parade All-American list is troublesome to BCAM for several reasons. First of all, the list includes only one or two players from any given state. If a player is so preeminent as to be included on such a list, that player will not be "forgotten." Secondly, as is set forth elsewhere in this brief, BCAM does not believe that decisions regarding interscholastic athletics should be driven by the consideration that a particular action *might* impact one or two individuals on an annual basis, especially when it has a corresponding adverse impact on hundreds, if not thousands, of other individuals. Causing many to suffer so that a chosen few can receive purely individual attention or benefits is inconsistent with the overriding emphasis of interscholastic athletics upon team competition and accomplishment.

Playing basketball in the fall does not work a disadvantage to Michigan girls. Even if some adverse impact were established, same would not have been found to rise to the level of a denial of equal protection had the lower courts applied the correct analysis.

CONCLUSION

For the reasons set forth above, BCAM submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Dated: March 31, 2005

Respectfully submitted,

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(6)

No. 04-1021

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* MICHIGAN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Michigan Association of School Boards (MASB) respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Pursuant to Supreme Court Rule 37(2)(b), counsel for *amicus* wrote to counsel for all parties in this action requesting written consent to file this brief. Petitioner has consented to MASB's participation in this matter. A letter attesting to its consent has been submitted to this Court. Counsel for Respondents have withheld their written consent for *amicus* to file this brief, necessitating the filing of this motion. *Amicus* submits that this case raises such crucial issues regarding the management of single sex programs in schools that Respondent's decision to withhold consent should not foreclose participation by interested *amicus curiae*.

Founded in 1949, the Michigan Association of School Boards (MASB) is a voluntary, nonprofit association of over 600 local and intermediate boards of education throughout the State of Michigan. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

The board of education of each school district in Michigan serves as the administrative body entrusted with the management of the public schools within a prescribed geographical region of the state. Under Michigan law, each school board is responsible for the educational programs,

fiscal management, and staffing of the public schools within its jurisdiction.

Thus, MASB has a relevant interest in the development of clear and rational education law and recognizes its obligation to assist the courts in cases involving questions of major significance. Further, MASB has previously been a contributor of *amicus* briefs in this Court in the cases of *Zelman v. Simmons-Harris*, No. 00-1751, 00-1777, 00-1779, October Term, 2000, *Grutter v. Bollinger*, No. 02-241, October Term, 2002, and *Gratz v. Bollinger*, No. 02-516, October Term, 2002.

Because the issue presented by this case has such a direct bearing on how the members of *amicus* and other similarly situated school districts implement single-sex programs, MASB respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,

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Whether *any difference* in the implementation of a single-gender interscholastic athletic or educational program must be characterized as a presumptively unconstitutional gender classification subject to intermediate scrutiny?

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INTEREST OF AMICUS CURIAE

The Michigan Association of School Boards ("MASB") respectfully submits this brief *amicus curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States.[1] Founded in 1949, MASB is a voluntary, nonprofit association of over 600 local and intermediate boards of education throughout the State of Michigan. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education. MASB has had a longstanding interest in the development and implementation of local school board policies, including those assuring compliance with the Equal Protection Clause and Title IX of the Education Amendments of 1972. *Amicus* believes that to subject school districts to an "exceedingly persuasive justification" standard for all individual differences relating to single-sex programs will subject school officials to the constant threat of litigation for every decision they make in regards to the programs.

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[1] The Petitioner has consented to the filing of this brief. The written consent is on file with the Clerk. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, MASB states that no counsel for any party authored this brief in whole or in part, and no person or entity other than MASB and its counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

We adopt the Statement of the Case as presented by Petitioner.

ISSUE PRESENTED FOR REVIEW

Whether *any difference* in the implementation of a single-gender interscholastic athletic or academic program must be characterized as a presumptively unconstitutional gender classification subject to intermediate scrutiny?

SUMMARY OF THE ARGUMENT

This Court can provide school districts with a definitive ruling on whether minor differences in single-gender athletic and education programs constitute facial gender classifications under the Equal Protection Clause. Unfortunately for school districts in the Sixth Circuit, the Court of Appeals decided this case by classifying *any difference* between male and female programs as a presumptively unconstitutional facial gender classification. This misclassification places school districts in the unfortunate position of justifying any difference in the programs under intermediate scrutiny, which requires establishing an "exceedingly persuasive justification" for the difference. This burden may cause school districts to reconsider the utility of offering single-gender athletic teams and it clearly creates difficulties for school districts that are operating or considering single gender educational programs.

School districts have historically operated athletic programs that include single-sex teams. And, while the practice of affirmatively limiting athletic teams to one gender has been successfully and unsuccessfully challenged under the Equal Protection Clause (*see O'Connor v. Board of Education*

of School District 23, 449 U.S. 1301 (1980); *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (9th Cir. 1983), *cert. denied*, 464 U.S. 1818 (1983); *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*, 647 F.2d 651 (6th Cir. 1981), the custom of operating separate and equal teams without such restrictions continues without encountering the same constitutional challenges. The Court of Appeals' decision, however, opens the door for school districts to be besieged with claims of discriminatory treatment relating to even the smallest differences between the separate teams.

Further, numerous elementary and secondary school districts have experimented with single-sex classrooms and schools as a way of providing students with a greater variety of academic opportunities.[2] While some programs have been challenged under Title IX and the Equal Protection Clause, *see Vorchheimer v. Philadelphia School District,* 532 F.2d 880 (3d Cir. 1976), *aff'd,* 430 U.S. 703 (1977); *Garrett v. Board of Education* 775 F. Supp. 1004 (E.D. Mich. 1991), there have been many success stories. *Amicus* does not argue that these single-sex classrooms and schools should not be subject to intermediate scrutiny review that this Court applied in *United States v. Virginia*, 518 U.S.515 (1996). However, if a school board decides to offer a single-sex school in its district that is essentially equal to other schools within the district, should the school board be subjected to repeated constitutional claims over the minute details of administering the school? Such judicial interference with local academic

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decision-making would "stifle the ability of the local school board to continue with a respected educational methodology." *Vochheimer,* 532 F.2d at 886.

Whether a school district is administering athletic programs or single-sex schools, it is difficult to imagine how any difference in treatment between males and females could survive the difficult standard of proving an "exceedingly persuasive justification" for the difference.

ARGUMENT

I. Single-Gender Interscholastic Athletic Programs Will Suffer Irreparable Harm If Any Difference Relating to the Administration of Separate Male and Female Programs Is Characterized as a Presumptively Unconstitutional Gender Classification Subject to Intermediate Scrutiny.

It is safe to say that almost all interscholastic athletic programs operate with separate-sex athletic teams. The reasons for single-gender teams vary from citing the physical and psychological differences between males and females to concerns that there would be a substantial risk that males would dominate the female programs and deny females an equal opportunity to compete in interscholastic events without a gender-based classification. *See O'Conner v. Board of Education of School District 23,* 449 U.S. 1301 (1980). In any event, there is clearly a need for separate-sex athletic teams in public schools.

The decision of the Court of Appeals to classify any difference between single-gender teams as a facial gender classification serves to possibly threaten the existence of having separate high school sports teams for males and

females. Because every decision that results in even the smallest difference between single-gender teams has now the potential of turning into a constitutional battle in court, schools may rethink whether offering separate teams is actually worth the risk of violating the Equal Protection Clause.

The operation of just two single-gender athletic teams has the potential of creating a multitude of differences between the two teams, each carrying the threat of an Equal Protection claim that compels the school district to now provide an exceedingly persuasive justification for the distinction. For example, a school district can easily establish substantially equal boys' and girls' basketball teams, but the administration of the two teams could lead to several other minor differences in addition to playing in different seasons, such as:

- If the two teams play during the same season, the teams will have a different coach.
- The teams will have different practice schedules if a gymnasium must be shared.
- The teams will likely have their games officiated by different referees.[3]
- The teams will have different locker rooms.
- The teams will have different uniforms.
- The length of practices may vary between the two teams.

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[3] Ironically, the first three differences that are noted are exacerbated by the change of seasons that the lower courts have mandated. *See* Petitioner's Brief at 14. Thus, the Court of Appeals' decision not only provides a greater opportunity for challenging single-gender athletic programs, it also serves to create additional circumstances that will be ripe for Equal Protection claims.

- The teams may play on different days of the week.
- Cheerleaders may perform at games for one team, but not the other.
- The pep band may play at games for one team, but not the other.
- The athletic boosters may operate a concession stand at games for only one team.

Thus, the differences that result from administering two separate single-gender teams are limitless. Like the scheduling of the teams' seasons, the differences occurred as a result of operating the two teams from a gender-neutral perspective. In other words, the teams have different uniforms because they are different teams, not because one team is made up of boys and the other consists of girls. Likewise, cheerleaders may perform only at boys' basketball games because those games traditionally draw larger crowds; the gender of the team is, once again, not a factor in making a determination that results in a disparity between the boys' and girls' teams. And when the difference is treated as a facial gender classification, it is unlikely that the school district's justification for the different treatment – that the cheerleaders simply like performing before larger crowds – would achieve the "exceedingly persuasive" standard. Further, it would be an administrative nightmare for a school district to even attempt to operate boys' and girls' teams without creating even the slightest difference. Sadly, as a result of the Court of Appeals' decision, the only infallible approach for school districts that wish to avoid future facial gender discrimination claims is to eliminate separate-gender athletic teams.

In the past, colleges and universities were placed in the unenviable position of eliminating athletic teams in order to comply with the equality requirements of Title IX. The

discourse that this practice created eventually led to a new interpretation of complying with Title IX by the Department of Education, Office of Civil Rights.[4] Now, high schools may have to consider the same difficult decisions and follow that "disfavored practice" in order to comply with the Equal Protection Clause, as interpreted by the Court of Appeals.

II. Courts Must Proceed with Caution When Asked to Determine Local Policy Issues on Behalf School Districts.

Judicial deference to academic judgment in a range of areas is consistent with the principle of academic independence that the Court of Appeals' decision disregards. Courts have been chary to supplant educational judgment when doing so would interfere with a school board's good faith performance of its core functions.

In particular, this Court has repeatedly recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley,* 418 U.S. 717, 741 (1974); *see e.g., Dayton v. Brinkman,* 433 U.S. 406, 410 (1977) ("[O]ur cases have...firmly recognized that local autonomy of school districts is a vital national tradition."). Further, this Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 226 (1985).

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That reluctance is grounded both in federalism concerns and in a healthy awareness of limited judicial competence in educational administration. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and expertise" educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic decisions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying out their educational missions. *Ewing*, 474 U.S. at 226 n. 11 (internal quotation omitted).

On a number of occasions, this Court has affirmatively passed at opportunities to second-guess the educational decisions of school officials. In *Wood* v *Strickland*, 420 U.S. 308 (1975), for example, this Court opined that

> [i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion....This system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members.

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And more recently, this Court was asked to interpret the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, to determine if the federal law prohibits students from grading one another's papers. This Court used the opportunity to again acknowledge that it will hesitate before interpreting a federal statute to effect a substantial change in the balance of federalism, unless that is the manifest

purpose of the legislation. In emphasizing this point, this Court stated:

> We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it.

Owasso Indep. Sch. Dist. v *Falvo*, 543 U.S. 426 (2002)

Not only is local control a longstanding tradition in the United States, but it also serves important interests. For example, according to this Court, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *Milliken*, 418 U.S. at 742.

Undoubtedly, the decision of the Court of Appeals weakens the local control of school districts in the Sixth Circuit and *discourages* experimentation and innovation. Ironically, this decision comes at a time when schools are being enticed with the promise of additional federal funds for developing single-sex schools. A provision of the No Child Left Behind Act of 2001, 20 U.S.C. 7215(a)(23) (Supp. I 2003), provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms." For most school districts, however, the risk of costly litigation relating to minor differences between all-boys

and all-girls schools and classrooms will likely outweigh the prospect of receiving whatever additional funding the federal government can provide. It is difficult to see how a school could prove an exceedingly persuasive justification for different lunch menus, for example, between two single-gender schools. Much like scheduling seasons for single-gender athletic teams, establishing lunch menus for a school is one of many administrative decisions that must be made in managing the school. Such decisions will inevitably create minor differences between two programs or schools, while overall, they remain substantially equal. Thus, to place the burden of proving an exceedingly persuasive justification for inconsequential differences on school boards has the effect of diminishing the board's local authority to establish a single-gender school as an educational option for the district's students.

Amicus does not take a position on the issue of whether offering single-gender schools is a right or wrong option for public school districts. However, if a local school board diligently researches the issue of single-gender schools and classrooms and makes a sound educational decision based on the district's historical experiences and local conditions, the school board should at least be given the opportunity to carryout an innovative plan for establishing single-gender programs without the burden of justifying every minor detail in court. Unfortunately, the Court of Appeals' decision takes away that opportunity and ignores the counsel of this Court, which has advised other courts "to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District,* 411 at 42-43.

The decision of the Court of Appeals necessitates this Court to reaffirm the educational discretion properly vested in state and local education officials, acting within legal parameters, to practice their core educational mission by pursuing bold and visionary ideas to raise student achievement and provide more educational options for all students.

CONCLUSION

For the reasons set forth above, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Brad A. Banasik
Counsel of Record
MICHIGAN ASSOCIATION OF SCHOOL BOARDS
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LANSING, MICHIGAN 48917

MOTION FILED

(8)

No. 04-1021

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* MICHIGAN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Michigan Association of School Boards (MASB) respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Pursuant to Supreme Court Rule 37(2)(b), counsel for *amicus* wrote to counsel for all parties in this action requesting written consent to file this brief. Petitioner has consented to MASB's participation in this matter. A letter attesting to its consent has been submitted to this Court. Counsel for Respondents have withheld their written consent for *amicus* to file this brief, necessitating the filing of this motion. *Amicus* submits that this case raises such crucial issues regarding the management of single sex programs in schools that Respondent's decision to withhold consent should not foreclose participation by interested *amicus curiae.*

Founded in 1949, the Michigan Association of School Boards (MASB) is a voluntary, nonprofit association of over 600 local and intermediate boards of education throughout the State of Michigan. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

The board of education of each school district in Michigan serves as the administrative body entrusted with the management of the public schools within a prescribed geographical region of the state. Under Michigan law, each school board is responsible for the educational programs,

fiscal management, and staffing of the public schools within its jurisdiction.

Thus, MASB has a relevant interest in the development of clear and rational education law and recognizes its obligation to assist the courts in cases involving questions of major significance. Further, MASB has previously been a contributor of *amicus* briefs in this Court in the cases of *Zelman v. Simmons-Harris*, No. 00-1751, 00-1777, 00-1779, October Term, 2000, *Grutter v. Bollinger*, No. 02-241, October Term, 2002, and *Gratz v. Bollinger*, No. 02-516, October Term, 2002.

Because the issue presented by this case has such a direct bearing on how the members of *amicus* and other similarly situated school districts implement single-sex programs, MASB respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,

BRAD BANASIK
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Owasso Indep. Sch. Dist. v *Falvo*, 543 U.S. 426 (2002)

Not only is local control a longstanding tradition in the United States, but it also serves important interests. For example, according to this Court, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *Milliken*, 418 U.S. at 742.

Undoubtedly, the decision of the Court of Appeals weakens the local control of school districts in the Sixth Circuit and *discourages* experimentation and innovation. Ironically, this decision comes at a time when schools are being enticed with the promise of additional federal funds for developing single-sex schools. A provision of the No Child Left Behind Act of 2001, 20 U.S.C. 7215(a)(23) (Supp. I 2003), provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms." For most school districts, however, the risk of costly litigation relating to minor differences between all-boys

and all-girls schools and classrooms will likely outweigh the prospect of receiving whatever additional funding the federal government can provide. It is difficult to see how a school could prove an exceedingly persuasive justification for different lunch menus, for example, between two single-gender schools. Much like scheduling seasons for single-gender athletic teams, establishing lunch menus for a school is one of many administrative decisions that must be made in managing the school. Such decisions will inevitably create minor differences between two programs or schools, while overall, they remain substantially equal. Thus, to place the burden of proving an exceedingly persuasive justification for inconsequential differences on school boards has the effect of diminishing the board's local authority to establish a single-gender school as an educational option for the district's students.

Amicus does not take a position on the issue of whether offering single-gender schools is a right or wrong option for public school districts. However, if a local school board diligently researches the issue of single-gender schools and classrooms and makes a sound educational decision based on the district's historical experiences and local conditions, the school board should at least be given the opportunity to carryout an innovative plan for establishing single-gender programs without the burden of justifying every minor detail in court. Unfortunately, the Court of Appeals' decision takes away that opportunity and ignores the counsel of this Court, which has advised other courts "to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District,* 411 at 42-43.

The decision of the Court of Appeals necessitates this Court to reaffirm the educational discretion properly vested in state and local education officials, acting within legal parameters, to practice their core educational mission by pursuing bold and visionary ideas to raise student achievement and provide more educational options for all students.

CONCLUSION

For the reasons set forth above, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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MAR 1 4 2005

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No. 04-1021

In the
Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION AND PROPOSED BRIEF OF *AMICUS CURIAE* MICHIGAN INTERSCHOLASTIC ATHLETIC ADMINISTRATORS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MICHIGAN INTERSCHOLASTIC ATHLETIC ADMINISTRATORS ASSOCIATION

The Michigan Interscholastic Athletic Administrators Association (MIAAA) by its attorney, Allen S. Bush, hereby moves for leave to file a brief amicus curiae in the above captioned matter for the following reasons:

1. The MIAAA is a not-for-profit Michigan Corporation composed of 733 individuals who are, or were, practicing athletic administrators in the State of Michigan.

2. The MIAAA believes that it has information and insights, which relate directly to the issues of the appeal at hand.

3. Any remedy and determination will have a vital impact on the manner in which the members of the MIAAA may practice their profession in the State of Michigan in that a change in the sports seasons and the scheduling of athletic contests will directly affect the individual administrators in their day-to-day operation and employment and in their efforts to promote and to provide quality athletic opportunities for all students in their respective school districts.

4. The MIAAA applied for and was granted amicus curiae status in the U.S. District Court and the Court of Appeals for the Sixth Circuit in their deliberations on the matter below.

THEREFORE, this Amicus Curiae Petitioner requests that this Court grant its Motion for Leave to file a Brief Amicus Curiae and that the Court accept the attached Proposed Brief

Amicus Curiae in support of the positions of the Michigan High School Athletic Association's Petition for Certiorari.

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INTEREST OF THE AMICUS

The Michigan Interscholastic Athletic Administrators Association (MIAAA) is a Michigan not-for-profit corporation composed of more than 700 members, who are athletic administrators in the public and private schools of Michigan. The members of the MIAAA are generally charged with the day-to-day administration of the athletic programs of their respective schools. They are in charge of scheduling contests and facilities, hiring and evaluating coaches and workers, and insuring compliance with all of the rules and regulations of their school district, their leagues, and the Michigan High School Athletic Association as the rules would pertain to the entire interscholastic athletic program. Because of the profound effect of the lower Court's rulings upon the day-to-day activities of the members and the programs they administer, the MIAAA is filing this brief in support of the Petitioner. The parties were asked to consent to the filing of this brief; Petitioners consented, but the Respondents declined.[1]

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit should be summarily reversed. The Sixth Circuit has created an administrative nightmare for the members of this Association in that the Court has affirmed the erroneous decision of the U.S. District Court for the Western District Of Michigan by emphasizing

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[1] Counsel for the parties of this case did not author this brief in whole or in part. No person or entity, other than the amicus curiae, MIAAA, its members, and its counsel, made a monetary contribution to the preparation and submission of the brief.

that any differences between boys' and girls' athletic programs, no matter how slight, are presumptively unconstitutional. Instead of individuals complaining to the Office of Civil Rights under Title IX, 20 USC 1681-1688, those same individuals can now file a federal lawsuit seeking to have any decision they oppose declared unconstitutional with the burden of proof falling upon the school to show an exceedingly persuasive reason for the decision. The administration of single-gender athletic teams, a concept encouraged under Title IX to maximize the participation opportunities of females in interscholastic sports, will become too costly and too unwieldy for any Michigan school district to operate. If the average school district in Michigan is confronted with multiple constitutional challenges to the operation of its single-sex athletic teams, it will stop having single-sex teams to save the costs of the litigation and revert to one team per sport. The net effect will be to reduce the participation opportunities for all children in the State of Michigan. Thirty years of steady increases in athletic opportunities for young people will be erased and a valuable educational experience will be denied to a large number of children.

ARGUMENT

Before the instant litigation began, the sports seasons for boys' and girls' athletics were set by the local school districts of the State of Michigan through elected representatives to the Michigan High School Athletic Association. From time to time, over the years, the seasons for some of the sports were changed to accommodate the desires of the majority of the districts. The most important concerns have always been the climate, facilities, and other resources that were necessary for the programs to succeed. In point of fact, not all of the schools in the state had the same seasons for all of the same

sports due principally to the weather and facility limitations of Michigan's more northern and rural Upper Peninsula.

The U.S. District Court for the Western District of Michigan reached a novel determination that there were traditional and non-traditional seasons for every sport, and that boys' and girls' teams should be equally disadvantaged in the scheduling of their high school sports' seasons. The Court ignored undisputed proof, which showed that Michigan's female athletic participation was greater than that of states with a greater overall population but which held "traditional" seasons for girls' athletics. The irony here is that the Michigan high schools had continuously created more opportunities for females under the guidance of the Office of Civil Rights and the statistics proved they were succeeding.

The Sixth Circuit did not balance the Title IX concerns for increased opportunities against the loss of those opportunities which have inevitably followed the change to the new "traditional" seasons. (In a recent report from the National Federation of High School Athletic Associations, North Dakota reported a 10.6% drop in girls' basketball participation and a 7% drop in volleyball participation; South Dakota, within two years of the change, dropped 13.1% in girls' basketball; Montana, within two years of the change, dropped 10.9% in girls' basketball and 8.1%in girls' volleyball; and in West Virginia, since the change was made in 1985-86, the number of girls and boys playing high school basketball has dropped 19.4% and 27.4%, respectively.).[2] Instead, the Court focused on the application of intermediate scrutiny requiring the MHSAA to show an exceedingly

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[2] Memorandum to Representative Counsel. Jack Roberts, Executive Director. November, 5, 2004.

persuasive reason that the seasons should not be changed, and in so doing made every issue of dissimilarity between a boys' program and a girls' program a constitutional concern. If that standard is the legal guide for the administration of athletic programs then it will lead to the abolition of separate-gender athletic teams.

As the athletic directors of the state began to regroup after the disappointing result from the Sixth Circuit, they became aware of the many issues that have been created by the decision. Aside from just selecting the date, time, and location of contests for boys' and girls' teams, they have to consider every detail of the athletic programs. Even assuming the uniforms and practice equipment can be purchased uniformly for all teams regardless of gender, the most likely areas of dissimilarity will occur with the issues which have been the most difficult to resolve under Title IX. These areas are the quality and availability of coaches and game personnel, the use of limited facilities, publicity, fundraising, and off-season activities.

Many small and rural school districts have used the same coaching staff for boys' and girls' teams. With the seasons being changed to run simultaneously, it is unlikely the staff can operate both programs. The selection and hiring of quality coaches, officials and game workers appears to have become a constitutional question if some individual takes issue with whether the two programs were equally disadvantaged by the quality of the hirings related to their individual sport.

In the smaller high schools in the State of Michigan, it is rare to have access to more than one full-sized gymnasium. The scheduling of practice times and locations for various team levels (each basketball program customarily has three teams: a varsity, a junior varsity, and a freshmen team, per

gender), whether in the high school or at smaller elementary gyms, would need to be precisely the same. It is impossible to replicate the precise practice times for each of the teams in the same facility. This would include auxiliary activities such as Saturday and Sunday open gyms, weight training, or water training activities, and all of the scouting functions of video player access and medical training rooms. It will be impossible to replicate the precise times of the day for each similarly situated team to utilize the limited facilities for an exclusive team activity. There is simply no exceedingly persuasive argument for having the girls' varsity start practice at 3 p.m. and the boys' start at 4 p.m. other than someone needs to go first.

One special facilities problem for older or smaller schools with one varsity locker room is the use of that space. Any school constructed before 1980 does not have a varsity locker room that accommodates females. If the choice is to reconstruct the building or have a single basketball team, the likely choice is the latter.

Publicity has been an area of concern for the Office of Civil Rights under Title IX for many years. The concept is not only the amount of media coverage but the equal promotion of all of the teams. This concept includes the use of pep bands, cheerleaders, pep assemblies, and any other facet that contributes to the experience of the evening such as concession stands, meet- the-team nights, parents' nights, and booster organizations. It is difficult for this author to conceive that having or not having a concession stand at a high school basketball game is a presumptive violation of the United States Constitution.

Fundraising for high school sports has become a major problem for athletic administrators. The school districts have

not increased athletic budgets to match the huge growth in athletic programs, which is due, in large part, to the ever-growing interest of girls in athletics. It is most common for the schools to encourage the formation of booster clubs to provide supplemental funds for the programs. If the clubs are sport specific, their success tends to mirror the traditionally successful programs. If the club is a universal club, it supports all of the sports teams and is usually administered by the athletic director who allocates the funds to the teams. In either case, the athletic administrator cannot operate the programs without the booster funds, but it is likewise impossible to assure that each of the teams will receive precisely the same dollar amounts under either system. Whatever decision-making criteria are applied to the distribution of funds they will not be exceedingly persuasive if they are not exactly the same.

The parade of potential discrepancies between the various male and female programs is endless. The athletic administrators are currently challenged to meet the 'essentially equivalent' standards applied by the Office of Civil Rights for Title IX compliance. In trying to balance the individual preferences of coaches, competing schools, the availability of scarce facilities, talented workers and game officials, the need to be exceedingly persuasive for all of the decisions that are made makes the separation of teams an impossible burden. The schools will always look for the simplest and cheapest method to resolve their problems. In the instant case, to avoid endless litigation over trivial distinctions, the schools will either abandon athletics all together (an idea that would be politically unpopular) or resort to athletic teams open to all genders, thus, reversing thirty years of gender equity progress.

Athletic directors are committed to the educational value of athletic experiences for the young people of their schools. They value the lessons to be learned by every child and they are moved to participate in this process by the knowledge that the rulings of the lower Courts will destroy opportunities for the children of the State of Michigan. Every state in this union recognizes the phrase 'in the best interest of the child' as a guidepost for the legal rights of children. However, the findings in the Courts below are not in the best interests of the children of the State of Michigan.

CONCLUSION

The Court should reverse the decisions below.

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MOTION FILED

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No. 04-1021

In The

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Petitioner,

vs.

COMMUNITIES FOR EQUITY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Although Petitioner Michigan High School Athletic Association, Inc. ("MHSAA") has consented to the filing of this *amicus curiae* brief by the National Federation of State High School Associations ("NFHS"), Respondent Communities for Equity ("CFE") has withheld consent. The NFHS therefore moves, pursuant to Supreme Court Rule 37.2(b), for leave to file this *amicus curiae* brief in support of Petitioner.

The NFHS is the national service and administrative organization of high-school athletics. The NFHS provides leadership and national coordination for the administration of athletic programs and other interscholastic activities. Petitioner MHSAA, along with high-school athletic or activities associations in each of the other 49 states and the District of Columbia, is a member of the NFHS.

This case involves the implementation of separate-gender-high-school athletic programs, which directly implicates the NFHS's administrative and leadership role over high-school athletics. The NFHS therefore has a substantial interest in this case. The NFHS is also interested in the outcome of this case because it involves and affects a member institution. As the national leader and coordinator of high-school athletics, the NFHS's position on the impact of the Sixth Circuit's decision should be considered by the Court.

In addition, CFE's only stated basis for withholding consent is that *amicus curiae* briefs are not allowed at the petition-for-certiorari stage. The plain terms of Supreme Court Rule 37, however, endorse the filing of an *amicus curiae* brief in support of a petition for a writ of certiorari.

See Sup. Ct. R. 37.2 ("An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, . . . may be filed . . . ").

Because CFE has not offered a legitimate basis to oppose the filing of the NFHS's *amicus* brief – and based on the NFHS's identified interests in this case – the NFHS respectfully requests leave to file the attached *amicus curiae* brief in support of Petitioner.

Respectfully submitted,

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BRIEF OF NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted by the National Federation of State High School Associations ("NFHS").[1] Petitioner Michigan High School Athletic Association, Inc. ("MHSAA") has consented to the NFHS's filing of this brief. Respondent Communities for Equity has withheld consent. A motion for leave to file this *amicus* brief under Supreme Court Rule 37.2(b) is therefore included with this brief.

INTEREST OF *AMICUS CURIAE*

The NFHS is the national service and administrative organization of high-school athletics. Founded in 1920, the NFHS is composed of one high-school athletic or activities association in each of the fifty states and the District of Columbia. The NFHS's membership, in turn, provides membership for approximately 90 percent of the high schools in the United States.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic

[1] Pursuant to Supreme Court Rule 37, the NFHS states that this brief has not been authored in whole or in part by counsel for a party to this case. The brief was instead authored by outside counsel for the NFHS. The NFHS further states that no person or entity other than the NFHS made a monetary contribution to the preparation or submission of this brief. Although Petitioner MHSAA is a member of the NFHS, and has paid the standard annual membership dues, it has not made any specific financial contribution to this brief's preparation or submission.

activities. The NFHS works to enhance the educational experiences of high-school students and to reduce the risks to them of participating in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The NFHS wants to protect interscholastic athletics.

The NFHS's mission and objectives give it a significant interest in successfully implementing separate-gender athletic programs in American high schools. Separate programs are essential to meaningful and rewarding participation for both genders. But the Sixth Circuit's decision in this case threatens the very existence of separate programs by making even routine decisions to implement such programs presumptively unconstitutional. The NFHS believes the Sixth Circuit's decision will harm high-school interscholastic athletics and believes that certiorari should be granted both to correct the Sixth Circuit's erroneous equal-protection analysis and to ensure equality in high-school athletics.

SUMMARY OF ARGUMENT

The Sixth Circuit's application of heightened scrutiny to the scheduling decisions at issue might ostensibly appear to promote gender-equity in high-school athletics. The NFHS believes, however, that the decision will have the opposite effect. Implementing decisions that are not facially discriminatory, like the ones at issue here, should not be presumptively unconstitutional. Decisions to allocate scarce resources between genders are difficult

enough already. The goals of separate-gender athletics would be better served by requiring challenges to already-difficult allocation decisions to show discriminatory intent or overall inequality to establish a constitutional violation.

ARGUMENT

The NFHS fully embraces Title IX and all that it entails. Even beyond Title IX, however, the NFHS seeks to promote, to the fullest extent possible, equality in athletics at the high-school level. The NFHS also wants to make high-school-sports participation for both girls and boys as broadly available as possible. The NFHS has substantial fears, however, that the Sixth Circuit's decision in this case threatens these efforts.

Notably, this case does not involve a challenge to the threshold decision to have separate boys and girls athletic teams at the high-school level. This is undoubtedly because Respondents (and society in general) recognize the benefits of such a system. The attack is instead directed at specific decision-making necessary to implement separate-gender athletic programs. But the Sixth Circuit's decision to make all such implementing decisions subject to heightened scrutiny may well lead to unintended consequences.

High-school administrators around the nation have limited resources to allocate fairly between girls and boys programs. The need for separate programs also requires a host of day-to-day, practical, decisions. The Sixth Circuit's application of the heightened scrutiny established in *United States v. Virginia*, 518 U.S. 515 (1996), automatically, and unfairly, subjects such everyday decisions to a presumption of intentional discrimination. This presumption will

encourage challenges to, and unwarranted second-guessing of, every routine implementing decision. Administrators and officials will be saddled with the knowledge that every decision they make will require an "exceedingly persuasive justification[,]" *United States v. Virginia*, 518 U.S. at 531, and mere "reasonable" decision-making will not be acceptable.

From a practical standpoint, implementing decisions should not be viewed with such a skeptical eye. In the experience of the NFHS, the vast majority of high-school administrators make their decisions with the proper allocation of resources and gender-equality in mind. But because virtually any decision can be said to favor either boys or girls, a presumption of discrimination will only make it more difficult to allocate scarce resources fairly.

The NFHS believes that facially-neutral implementing decisions, like the scheduling decisions at issue here, should not require an "exceedingly persuasive justification." The high-school-athletic system would instead be better served by requiring a challenger to at least make a threshold showing that an implementing decision was either motivated by discriminatory intent or would lead to overall inequality. If the Sixth Circuit's decision is allowed to stand, unwarranted challenges may overwhelm an already burdened system and threaten the viability of separate-gender sports.

CONCLUSION

For the reasons set forth by Petitioner MHSAA, and the additional reasons identified above, the Petition for Writ of Certiorari should be granted.

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